89-981

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MIRIAM GELBAND and LEO KAYSER, III,
Individually and as Shareholders of TEXACO INC.,
suing on behalf of themselves and in the right of
and for the benefit of TEXACO INC.,

Petitioners,

– against –

TEXACO INC., JOHN K. McKINLEY, WILLARD C. BUTCHER, FRANK T. CARY, ALFRED C. DeCRANE, JR., THE EARL OF GRANARD, JAMES W. KINNEAR, ELVIS L. MASON, THOMAS H. MOORER, THOMAS S. MURPHY, GEORGE PARKER, JR., LORENE L. ROGERS, ROBERT V. ROOSA, FRANZ H. ULRICH, THOMAS A. VANDERSLICE and WILLIAM WRIGLEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Were the party-plaintiffs in a shareholders' derivative suit actively pending in New York denied Procedural Due Process by the New York trial court which dismissed their suit, on grounds of *res judicata* and Full Faith and Credit, based upon a Delaware consent judgment to which the New York plaintiffs were not parties, where:

(a) the New York plaintiffs had timely moved to intervene in the Delaware action but defendants opposed their motion to intervene and leave to intervene was denied;

(b) the defendants negotiated and executed the Delaware settlement agreement without notice to said New York party-plaintiffs;

(c) the defendants obtained, without notice to said New York party-plaintiffs and in violation of Delaware and federal law, a preliminary injunction from the Delaware Chancery Court enjoining said party-plaintiffs

from proceeding in New York pending approval of the settlement by way of entry of a consent judgment in Delaware;

(d) the defendants and settling plaintiffs in Delaware entered into a stipulated set of facts which assumed the ultimate factual conclusion of defendants' good faith motivations, to which the New York party-plaintiffs expressly excepted, but to which the New York party-plaintiffs were bound for purposes of the Delaware proceeding when their motion to intervene was denied;

(e) the New York plaintiffs were not permitted to opt -out of the Delaware derivative suit; and

(f) New York party-plaintiffs stated objections to the Delaware consent decree, but the standard of review accorded them was highly limited and did not afford them the procedural and substantive rights they would have if permitted to intervene as party-plaintiffs in the action.

TABLE OF CONTENTS **Page**

Question Presented i

Table of Contents iii

Table of Authorities iv

Introduction 2

Opinions Below 2

Jurisdiction 4

Constitutional Provisions Involved 4

Statement of the Case 5

How the federal question was presented before the courts below 12

REASONS FOR GRANTING THE WRIT 16

I. This case presents an ideal opportunity for this Court to determine whether the Due Process Clause permits non-parties to be bound by a consent decree entered in a class action or representative suit in which they were not permitted to opt-out and were denied leave to intervene. 16

II. The New York Courts disregarded principles recently announced by this Court regarding civil rights consent decrees, and the Court should examine whether those principles apply to shareholder litigation. 27

Conclusion 36

Appendix A-1

TABLE OF AUTHORITIES

Page

Cases

Antibiotic Antitrust Actions, 333 F. Sup. 296, (S.D.N.Y. 1971) *aff'd.* F.2d 1119, *cert. denied* 408 U.S. 930, 92 S. Ct. 2496, 33 L. Ed.2d 343 (1972) 22

In re Birmingham Reverse Discrimination Litigation, 833 F. 2d 1492, (11th Cir. 1987) 29

Breswick & Co. v. Briggs, 139 F.Supp. 297 (S.D.N.Y. 1955) 21

City Capital Associates v. Interco, 551 A.2d 787 (Del. Ch. 1988) 11

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed.2d 732 (1974) 19

In re Four Seasons Securities Laws Litigation, 502 F.2d 834 (10th Cir. 1974) 18, 23

Hansberry v. Lee, 311 U.S. 32 (1940) 17

Martin v. Wilks, 490 U.S. ---, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989). 15, 27-35

Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) 19

Phillips Petroleum Company v. Shutts, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) 23, 24

Ross v. Bernard, 396 U.S. 531, 90 S.Ct. 733 (1970) 21

Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 86 S.Ct. 845 (1966) 35

Society Hill Civic Ass'n v. Harris, 632 F.2d 1045 (3d Cir. 1980) 25

United States v. Jefferson County, 28 FEP Cases 1834 (N.D. Ala. 1981) 28

Statutes

CPLR §908 13

28 U.S.C. §1257(a) 4

Rule

Fed. R. Civ. P. Rule 23 (c)(2) 19

Miscellaneous

9 Carmody - Wait 2d §63:245 13

9 Carmody-Wait 2d §63:246 13

Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions under Federal Rule 23*, 123 U. Pa. L. Rev. 1217 (1975) 22

Developments in the Law -- Class Actions, 89 Harv. L. Rev. 1318 (1976) 19, 22

Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (1974) 18

Note, *Res Judicata in the Derivative Action: Adequacy of Representation and the Inadequate Plaintiff*, 71 Mich. L. Rev. 1042 (1973) 20

2 Weinstein-Korn-Miller, N.Y. Civ. Prac., ¶905.03 13

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

MIRIAM GELBAND and LEO KAYSER, III, Individually and as Shareholders of TEXACO INC., suing on behalf of themselves and in the right of and for the benefit of TEXACO INC.,

Petitioners,

-against-

TEXACO INC., JOHN K. McKINLEY, WILLARD C. BUTCHER, FRANK T. CARY, ALFRED C. DeCRANE, JR., THE EARL OF GRANARD, JAMES W. KINNEAR, ELVIS L. MASON, THOMAS H. MOORER, THOMAS S. MURPHY, GEORGE PARKER, JR., LORENE L. ROGERS, ROBERT V. ROOSA, FRANZ H. ULRICH, THOMAS A. VANDERSLICE and WILLIAM WRIGLEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

INTRODUCTION

Petitioners MIRIAM GELBAND and LEO KAYSER, III, individually and as shareholders of TEXACO INC., on behalf of themselves and in the right of and for the benefit of TEXACO INC., respectfully pray that based upon the serious questions of procedural due process stated in the Questions Presented herein, this Court grant a writ of *certiorari* to review the judgment of the New York Supreme Court, as affirmed by New York Appellate Division and denied further review by the New York Court of Appeals, dismissing their pending New York shareholders' derivative action under the Full Faith and Credit Clause based upon a Delaware consent decree.

OPINIONS BELOW

The Order of the Court of Appeals of New York denying Petitioners' motion for reargument of Petitioners' motion for leave to appeal, without opinion,

has not been reported, but is reproduced in the Appendix (A-18).[1]

The Order of the Court of Appeals of New York denying Petitioner's motion for leave to appeal, without opinion, was reported at 74 N.Y. 2d 606, 543 N.Y.S. 2d 398, 541 N.E. 2d 427 (1989). (A-16)

The Order of the Court of Appeals of New York dismissing Petitioner's appeal to that court, without opinion, was reported at 72 N.Y. 2d 951, 533 N.Y.S. 2d 58, 529 N.E. 2d 426 (1988). (A-14)

The Order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, affirming the trial court, without opinion, was reported at 140 A.D. 2d 1013, 529 N.Y.S. 2d 929 (1988). (A-12)

The opinion and order of the Supreme Court of the State of New York (Hon. Andrew R. Tyler, J.), was not

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[1]Numbers in parenthesis preceded by "A" refer to pages of the Appendix to this Petition.

reported. The opinion (A-1) and order (A-8) of the trial court are reproduced in the Appendix to this Petition.

JURISDICTION

The Order of the Court of Appeals of the State of New York denying Petitioner's timely motion for reargument of Petitioner's motion for leave to appeal was dated and entered September 14, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Section 1, of the Constitution of the United States

Fifth Amendment to the Constitution of the United States

Fourteenth Amendment to the Constitution of the United States

STATEMENT OF THE CASE

On March 23, 1984, Petitioner Gelband initiated a derivative shareholders' suit against the directors of Texaco, Inc. through the service of a summons and complaint. (R. 16-22)[2] The Complaint[3] alleged a gross waste of corporate assets, a breach of fiduciary duty and a discriminatory repurchase of approximately 10% of the outstanding common stock of Texaco, Inc. from the Bass syndicate at a price of $50 per share on March 6, 1984, when the shares were trading at $42.625 per share that day. The complaint further alleges that said purchase was for the sole unlawful purpose of maintaining

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[2]Numbers in parenthesis preceded by "R" refer to pages of the Record on Appeal in the Appellate Division of the Supreme Court of the State of New York, which Record was also submitted to the Court of Appeals of New York.

[3]For purposes of this appeal, the allegations of the complaint are assumed to be true and the complaint is assumed to state good causes of action. The issue herein is whether the causes of action have been extinguished by a Delaware consent judgment to which Gelband was not a party.

management control. (R. 15-22)

On May 19, 1984, the Texaco directors moved to dismiss the complaint for an alleged failure to make a proper demand on the Board of Directors prior to initiating the suit. (R. 230-245) This motion was withdrawn and an answer was interposed by defendants dated June 19, 1984, in light of a decision[4] dated March 14, 1984 in Delaware which held that the Texaco directors had an interest in the transaction with respect to the issue of corporate control. (R. 246-258)

From June 20, 1984 to November 14, 1984, Gelband actively engaged in discovery, obtaining documents from the defendant directors and attending certain depositions[5] being conducted pursuant to an agreement for joint discovery for the several New York and

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[4]This decision arose out of a contested motion.

[5]Depositions attended were those of John K. McKinley, Chairman of the Board of Texaco, and John P. Hellstrom, an investment banker who provided advice to Texaco, two of the six depositions taken. (R. 46, 217)

Delaware actions. (R. 278-302)

On or about November 14, 1984, Gelband received notice for the first time[6] that various plaintiffs' counsel in the consolidated derivative shareholders' actions in Delaware had negotiated and executed a stipulation of settlement, which was presented to the Delaware Chancellor to be incorporated into a court order dated November 14, 1984. (R. 219, 45-48) The November 14, 1984 Delaware court order *inter alia*, expressly enjoined Gelband from proceeding in New York stating:

> Pending final determination of whether the Settlement should be approved, the Court of Chancery has ordered that no member of the class and no Texaco stockholder may commence or prosecute any action asserting claims which have been or could have been asserted arising from or relating to any of the matters or transactions referred to in the Subject Actions or in the Stipulation.
> (R. 48, 220-221)

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[6]No doubt Gelband was excluded from the negotiations because of the opinion of her counsel as communicated to counsel for the Texaco directors that the derivative shareholders' case was very strong. (R. 217-8, 305)

The Stipulation of Settlement also incorporated into the November 14, 1984 order the following pivotal factual conclusions:

> Texaco management reviewed these self-tender and stock repurchase proposals and concluded that they were not in the best interest of Texaco or its stockholders. Thus, Texaco management determined that a repurchase program of the magnitude Mr. Bass was suggesting, and the resultant shrinking of Texaco's capitalization, was inconsistent with the business plans of the company. Messrs. McKinley and DeCrane testified that, under the circumstances, they viewed the Bass Defendants' ownership of approximately 9.9 percent of Texaco stock and the possibility that the Bass Defendants might acquire substantial additional shares to be disruptive of Texaco and a threatened diversion of management's attention from its pursuit of important business plans, including the integration of its operations with the recently acquired Getty Oil Co. Moreover, Texaco management believed that such disruption was likely to continue to take place notwithstanding the assurances by Mr. Bass that the Bass Defendants were supportive of Texaco management, in part because of the perception of the business and financial community of the intentions of the Bass Defendants. (R. 46, 88-89).

Not only were the settlement negotiations conducted behind the back of Gelband, with the stipulation of

settlement having been executed with no notice to Gelband, but the Texaco directors obtained the preliminary injunction contained in the November 14, 1984 Order without any notice whatsoever to Gelband. (R. 218-221) Gelband was compelled by the November 14, 1984 Order, having been enjoined from seeking protection of the New York courts or proceeding in New York in any other manner, to appear in Delaware to oppose settlement. Gelband was not afforded any opportunity to "opt-out" of the Delaware action.

Gelband filed papers in the Delaware Chancery Court objecting to the settlement and moving to intervene so as to avoid the agreement between the settling plaintiffs and the Texaco defendants stipulating to the ultimate factual conclusion that the Texaco directors had acted in good faith.[7] (R. 222-226; 71-94)

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[7]The argument of the Texaco directors was that they were too engaged in the digestion of Texaco's recent acquisition of the Getty Oil Company to have to worry about a tender offer or proxy fight challenging that corporate policy. (R. 46) This Court may take judicial notice that subsequent to the entering of the consent

Gelband expressly objected to that factual conclusion.[8] (R. 88-90) Defendants opposed Gelband's motion to intervene. (R. 429) Gelband's objections were overruled (R. 133-134, 139-140, 145) and her motion to intervene was denied. (R. 133-134, 139-140, 145) The Chancery Court did "not sit as though it were trying the case on the merits," but was merely required "to exercise its own independent business judgment" as to the fairness of the settlement proposal. (R. 122-123) Under this highly limited standard of review, the consent judgment providing for dismissal of the derivative shareholders suit

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judgment on March 12, 1985 (R. 141-145), a Texas jury found that Texaco had wrongfully acquired Getty Oil by inducing a breach of contract, which determination was affirmed by both the Texas intermediate appellate court and the Texas Supreme Court. Texaco settled paying over $3 billion to Pennzoil with its petition for *certiorari* pending before this Court and after filing for protection under Chapter 11 of the United States Bankruptcy Code.

[8]The position of Gelband was that the underlying facts, which themselves were not in dispute, lend themselves to a very different factual conclusion. Gelband has never had an opportunity to present her position on the merits to any court. (R. 87-90)

with no recovery for Texaco and the award of $700,000 in legal fees plus disbursements to plaintiffs' counsels (despite any significant outcome of the actions) was entered on March 12, 1985. (R. 141-145) Gelband appealed to the Supreme Court of Delaware, but was handicapped by the further limited scope of review which permitted that Court to examine only whether or not the Chancellor had abused his discretion in exercising his business judgment as to the reasonableness of settlement by settling plaintiffs. (R. 199-220)[9] The Supreme Court of Delaware affirmed in an opinion dated March 10, 1986. (R. 190-207)

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[9]In a single paragraph of its decision (R. 203, ¶1), the Delaware Supreme Court stated that Delaware case law precludes plaintiffs' attack on "greenmail," and defendants have made much of that paragraph in arguing that plaintiffs have had their "day in court" in Delaware. Plaintiffs maintain that the paragraph is entirely dictum, inaccurate as a statement of Delaware law, *see, e.g., City Capital Associates v. Interco*, 551 A.2d 787 (Del. Ch. 1988), and no substitute for plaintiffs' rights to litigate their claims on the merits, either as intervenors in Delaware or in their already pending New York action.

HOW THE FEDERAL QUESTION WAS PRESENTED BEFORE THE COURTS BELOW

By notice of motion dated April 15, 1986, the Texaco defendants moved in New York Supreme Court to dismissed Gelband's complaint on the ground of *res judicata*. (R. 29-30) The moving papers explicitly raised the federal question under the Full Faith and Credit Clause, and argued that plaintiffs had been afforded due process in the related Delaware proceedings. Plaintiffs responded that the procedures by which the Delaware consent decree were obtained were insufficient, as a matter of federal constitutional law under the Due Process Clause, to give *res judicata* to the Delaware judgment. By decision dated August 14, 1986, the New York Supreme Court, Hon. Andrew Tyler, J., granted the Texaco directors' motion. The decision noted the constitutional arguments made by defendants under the Full Faith and Credit Clause, and by plaintiffs under the Due Process Clause, and held that it was required to dismiss the complaint under the Full Faith and Credit

Clause. Although noting that Gelband had been denied the right to intervene, the trial nevertheless equated the appearance of Gelband for purposes of objecting to the stipulation of settlement as sufficient to accord full faith and credit against Gelband in New York, holding that procedural due process should be presumed. (A-6)[10] The order settling the decision was entered October 3, 1986. The decision (A-1) and the Order (A-8) of the New York Supreme Court are printed in the Appendix hereto.

Plaintiffs appealed to the Supreme Court of New York, Appellate Division, First Department. The appeal

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[10]The sole authority relied upon by Justice Tyler for this presumption was 9 Carmody - Wait 2d §63:245, which related to non-representative actions where a sister state had jurisdiction over the party challenging the sister state's judgment. *Compare* 9 Carmody-Wait 2d §63:246. The lower court also erroneously cited to 2 Weinstein-Korn-Miller, N.Y. Civ. Prac., ¶905.03, and CPLR §908 relating to class actions (the case at bar is a derivative shareholders' action), which do not relate to actively pending parallel actions and the rights to litigants therein, but rather to passive members of a class.

directly addressed the federal question under the Due Process Clause. By order entered May 19, 1988, the Appellate Division affirmed the trial court, without opinion. (A-12)

By Notice of Appeal dated June 22, 1988, plaintiffs appealed to the New York Court of Appeals, based upon the constitutional questions arising under the Full Faith and Credit and Due Process Clauses of the state and federal constitutions. The Court of Appeals conducted a *sua sponte* review of its jurisdiction over the appeal, and dismissed the appeal on September 22, 1988, without opinion. (A-14)

By notice of motion dated February 15, 1989, plaintiffs sought leave to appeal to the New York Court of Appeals. While plaintiffs' arguments on this effort to be heard concentrated on the application of *res judicata* under New York law, the federal question under the Due Process Clause was stated in the Questions Presented and plaintiffs invited its consideration by the

Court. The Court denied leave to appeal, without opinion, by Order dated June 15, 1989. (A-16)

By notice of motion dated July 10, 1989, plaintiffs sought reargument of their motion for leave to appeal to the Court of Appeals, based primarily on the principles recently stated by this Court in *Martin v. Wilks*, 490 U.S. ---, 109 S.Ct. 2180, 104 L.Ed. 835 (1989). The Court of Appeals denied the motion for reargument, without opinion, by order dated September 14, 1989. (A-18)

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IDEAL OPPORTUNITY FOR THIS COURT TO DETERMINE WHETHER THE DUE PROCESS CLAUSE PERMITS NON-PARTIES TO BE BOUND BY A CONSENT DECREE ENTERED IN A CLASS ACTION OR REPRESENTATIVE SUIT IN WHICH THEY WERE NOT PERMITTED TO OPT-OUT AND WERE DENIED LEAVE TO INTERVENE

The dismissal by the trial court of this actively pending New York action -- based upon a Delaware consent decree to which petitioners herein were not parties and were denied leave to intervene as parties by the successful opposition of defendants, where plaintiffs had no opportunity to opt-out of the Delaware action, but were bound by its stipulated factual conclusions with which they disagreed -- presents a useful vehicle for finding the minimum standards of due process which must be met before Full Faith and Credit may be given to consent decrees in representative actions. An elucidation of standards in this area would be useful not merely to the litigants now before this Court, but to the parties and courts involved in numerous other derivative

and class action suits across the United States.

As this Court stated in *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S. Ct. 115, 117,

> [W]hen the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.

To the general principle "that one is not bound by a judgment in personam in a litigation in which he has not designated as a party or to which he has not been made a party by service of process," the Court noted a limited exception for "class" or "representative" suits. 311 U.S. at 40, 41. The Court itself observed that the extent of the exception for representative suits was "not precisely defined by judicial opinion." 311 U.S. at 41. On the particular facts in *Hansberry*, the Court found the judgment in the prior representative suit could not be accorded *res judicata* because this would deny due

process to non-parties not adequately represented in the first action. The Court declined to offer rules or guidelines as to the minimum requirements of due process before *res judicata* could attach to judgments in other representative suits.

As the Tenth Circuit observed in 1974, "[t]he touchstones of due process in class actions have always been notice and adequacy of representation, but their interrelationship has never been completely and clearly articulated." *In re Four Seasons Securities Law Litigation*, 502 F.2d 834. Academic criticism has made the same point. *See, e.g.*, Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. Law Rev. 589 (1974) ("important questions remain undecided regarding how to determine the proper extent of binding effect.")

> Whether absentee class members ... must be given notice and an opportunity to be heard in a class suit if that suit is to comport with due process is a question much debated.... To date, the debate has proved inconclusive.

Developments in the Law -- Class Actions, 89 Harv. L. Rev. 1318, 1402-03 (1976)

Case law has only filled in some areas. In *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), this Court held that for notice to be constitutionally sufficient under the Due Process Clause, it must be "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." 339 U.S. at 314. Even where there was a guardian *ad litem* appointed by the Court, notice to absentee parties was held constitutionally required. *Id.* In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed.2d 732 (1974), the Court applied the notice requirements of *Mullane* specifically to class actions, under Fed. R. Civ. P. Rule 23 (c)(2).

Defendants have maintained that plaintiffs were adequately represented as objectors to the Delaware

consent decree. Yet the standard of review accorded non-party objectors denied plaintiffs any hearing on the merits of their claims. Plaintiffs' claims were not dismissed for failure to state a cause of action, nor was summary judgment granted based upon the lack of any substantial issue of law or fact. Rather, plaintiffs were held bound to a consent decree approved by the Delaware Chancellor merely because it appeared fair to him in his business judgment, and on appeal by the Delaware Supreme Court merely upon not finding that the Chancellor had abused his discretion in applying the independent business judgment standard for approval of the consent decree.[11] The opportunity to state objections under this highly limited standard of review

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[11]A leading academic comment on *res judicata* in derivative actions has described the hostility of settling parties and courts to objectors, and the "heavy burden ... placed on ... an objector to rebut the presumption that the offered settlement is a fair resolution." Note, *Res Judicata in the Derivative Action: Adequacy of Representation and the Inadequate Plaintiff*, 71 Mich. L. Rev. 1042, 1056 (1973).

is not equivalent to a determination on the merits.[12]

This Court has held that a shareholders' derivative suit is entitled to a determination on the merits of the corporation's claim, with the same right to trial by jury, under the Seventh Amendment to the U.S. Constitution, as the Corporation would have had if it had prosecuted the claim itself. *Ross v. Bernard*, 396 U.S. 531, 536, 90 S.Ct. 733, 736 (1970). Plaintiffs have taken every affirmative step possible to avoid being bound by a consent decree they opposed, and to prosecute their claims to a determination on their merits. This Court should now specifically examine whether defendants who opposed intervention by absent parties and thus blocked a determination of the merits of their claims may use the Full Faith and Credit Clause to dismiss an action already

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[12]Nor is it any substitute for the right to be represented in the *negotiation* of the settlement. *See, Breswick & Co. v. Briggs*, 139 F.Supp. 297 (S.D.N.Y 1955). Although they participated in joint discovery for the New York and Delaware actions, plaintiffs were not informed of settlement negotiations until after the agreement was signed and before the Court for approval.

pending in a sister state.

One academic commentator has noted that even "adequate representation" is only "the next best alternative to a day in court." "[E]ach absentee should be offered the opportunity to enter an appearance as to request exclusion." Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Rule 23*, 123 U. Pa. L. Rev. 1217, 1261 (1979) Another commentator notes a model of "private control" to ensure "adequate representation" would give each class member "a presumptive right to intervene or opt out." *Developments in the Law -- Class Actions*, 89 Harv. L. Rev. 1318, 1414 (1976).

A number of cases have focused on the availability of notice and of an opportunity to "opt-out" from a class action as a guarantee of due process to absentee class members. In *Antibiotic Antitrust Actions*, 333 F. Sup. 296, (S.D.N.Y. 1971) *aff'd.* F.2d 1119, *cert. denied* 408 U.S. 930, 92 S. Ct. 2496, 33 L. Ed.2d 343 (1972), plaintiffs

who sought to collaterally attack a class action had been given notice and an opportunity to "exclude themselves from the class," but neither opted out from the class action nor sought leave to intervene, and instead decided to participate merely as objectors. Their willing participation as mere objectors was held sufficient to bind them by the judgment. *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834 (10th Cir. 1974) held that due process was satisfied where a party was given notice of the terms of a proposed class settlement, an explicit opportunity to opt-out, and a warning that they would be bound if they failed to opt-out. The issue reached this Court in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed.2d 628 (1985) which considered whether a state court properly asserted personal jurisdiction over absent plaintiff class members sufficient so that under the Due Process Clause, *res judicata* would reasonably be expected to attach to the judgment. This Court specifically held:

[D]ue process requires at a minimum that an

> absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt-out' or 'request for exclusion' form to the court.

472 U.S. at 812, 105 S. Ct. at 2974. This requirement was *in addition* to the requirement "that the named plaintiff at all times adequately represent the interests of the absent class members." *Id.* The Court held that notice of an opportunity to "opt-out" was sufficient where absent class members received the notice but failed to affirmatively opt out, that due process was thus satisfied, and the absentees would be bound by the judgment under principles of *res judicata*.

Gelband was given no opportunity to "opt-out" of the Delaware consent settlement, in contrast to the procedures mandated and approved by this Court in *Phillips*. Rather than passively risk preclusion, by the Delaware settlement to which they were denied any opportunity to opt-out, plaintiffs *affirmatively* sought to protect their derivative claims and avoid being bound by the consent decree by moving to intervene, and thus

obtain a right to litigate their claims on the merits in Delaware. Defendants opposed the application to intervene, and leave to intervene was denied by the Delaware Chancellor.

Plaintiffs thus took every affirmative step possible to avoid being bound by the consent decree they opposed. They did not simply ignore the Delaware proceeding, recognizing "that intervention is a far better course than subsequent collateral attack, if intervention is feasible." *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045 (3d Cir. 1980). Plaintiffs cannot be charged with "an unjustified or unreasonable failure to intervene [which] can serve to bar a later collateral attack." *Id.* Like the plaintiffs in *Society Hill*, plaintiffs herein are "not barred by *res judicata* because [they] were *denied* intervention and did not have an adjudication on the merits of the issues raised by the plaintiffs in this case." 632 F.2d at 1050, n. 4.

The factual record in this case, involving plaintiffs with an already pending, actively litigated lawsuit in New York, who were not even afforded an opportunity to affirmatively opt out of the derivative suit pending in Delaware, but who nonetheless actively and timely sought leave to intervene in Delaware and were successfully opposed by defendants, affords this Court an excellent opportunity to clarify the due process standards which must be met before Full Faith and Credit and *res judicata* may take effect. The highly limited standard of review accorded to plaintiffs' objections to the Delaware settlement did not satisfy plaintiffs' constitutional right to a determination of the merits of their shareholders' derivative claims, and indeed, to a trial by jury of legal claims. This Court should determine whether in the absence of determination on the merits or an opportunity to "opt out," and despite the successful opposition by respondents to petitioners' application to intervene in Delaware, due process permits New York

to dismiss a pending action based upon Full Faith and Credit and *res judicata*.

II. THE NEW YORK COURTS DISREGARDED PRINCIPLES RECENTLY ANNOUNCED BY THIS COURT REGARDING CIVIL RIGHTS CONSENT DECREES, AND THE COURT SHOULD EXAMINE WHETHER THOSE PRINCIPLES APPLY TO SHAREHOLDER LITIGATION

On June 12, 1989, this Court announced its decision in *Martin v. Wilks*, 490 U.S. ---, 109 S.Ct. 2180, 104 L. Ed.2d 835. The Court held that a group of white firefighters were allowed to attack collaterally, in a separate, subsequent action, a consent decree previously entered settling an action by the NAACP and black firefighters against the City of Birmingham, Alabama. The Court's holding came notwithstanding the facts that (1) the trial court which had approved the consent

decree in the previous action did so only after requiring publication of notices of public hearing,[13] (2) white firefighters, represented in part by the Birmingham Firefighters Association, appeared at the hearings and stated objections to the consent decree,[14] (3) the trial court carefully considered, and rejected, each of the objections in turn,[15] and (4) white firefighters moved to intervene in the class action only after the hearing, and their application was denied as untimely.[16]

A group of white firefighters subsequently challenged employment decisions made purportedly pursuant to the consent decrees. The trial court ruled that to the extent the employment decisions were mandated by the consent decrees, they could not be

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[13]109 S.Ct. at 2183, 2191.

[14]109 S.Ct. at 2183, 2191.

[15]109 S.Ct. at 2191-2192.

[16]109 S.Ct. at 2183, 2191-2192. *United States v. Jefferson County*, 28 FEP Cases 1834 (N.D. Ala. 1981).

challenged in the subsequent lawsuit. Despite "the strong public policy in favor of voluntary affirmative action plans," the Eleventh Circuit reversed, holding that the because the white firefighter plaintiffs "were neither parties nor privies to the consent decrees, ... their independent claims of unlawful discrimination are not precluded." *In re Birmingham Reverse Discrimination Litigation*, 833 F. 2d 1492, 1498 (1987).

The Court specifically rejected the argument that "because respondents failed to timely intervene in the initial proceedings, their current challenge to actions taken under the consent decree constitutes an 'impermissible collateral attack.'" 109 S.Ct. at 2185. The Court held that full joinder as a party, rather than "knowledge of a lawsuit and an opportunity to intervene," is necessary to make a consent decree binding. The Court placed the burden on proponents of the consent decree rather than its opponents:

> It makes sense ... to place on [the parties to a lawsuit] a burden of bringing in additional parties where such a step is indicated, rather

> than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit.

109 S.Ct. at 2186.

The *Martin* decision is a dramatic departure, as the Court itself noted that most Circuit Courts of Appeals had rejected, as "impermissible collateral attacks," suits by persons who had prior knowledge of a consent decree but failed to timely move to intervene. 109 S.Ct. at 2185 n. 3. Indeed, *Martin* went considerably further than necessary to sustain the position of petitioners herein, as they had timely and affirmatively moved to intervene in the Delaware action. Rather than seeking affirmatively to join plaintiffs as parties in Delaware, respondents herein, as defendants in Delaware, successfully opposed plaintiffs' motion for leave to intervene! The dismissal by the New York Supreme Court, of plaintiffs' actively pending New York action on grounds of *res judicata* and Full Faith and Credit, should be reviewed in light of the *Martin* principles.

The present case is a compelling vehicle for determining the application of the *Martin* principles to shareholders' derivative actions. Unlike the white firefighters who were allowed in *Martin* to litigate a separate, subsequent action challenging the Birmingham consent decree, petitioners did not begin their New York action after the entry of the consent decree. Rather, plaintiffs' New York action was commenced the same month, March 1984, (R. 16-22) as that of those plaintiffs who entered into the consent decree in Delaware.

Unlike the white firefighters who were allowed to challenge the Birmingham consent decree, plaintiffs *did* timely move to intervene in the Delaware action. (R. 222-226; 71-94). Defendants opposed plaintiffs' application to intervene in the Delaware action, and leave to intervene was denied by the Delaware Chancellor. (R. 133-134, 139-140, 145). This Court held that even persons who were aware of a prior action which affected their rights and did not timely attempt to

intervene are entitled to pursue a subsequent collateral attack. Under these principles, petitioners herein, who did timely attempt to intervene in Delaware, should surely not barred by the Delaware consent decree from continuing their pending New York action.

Additional consideration should be given to petitioners' claim in that the Delaware consent decree with other shareholders does not carry the weight of historic importance and high national purpose which attached to the consent decree establishing an affirmative action plan to redress past discrimination. The Birmingham consent decree was entered only after the District Court had already found, after trial, that defendants violated Title VII of the Civil Rights Act of 1964 in using a biased screening test for job applicants. 109 S.Ct. at 2191. The underlying litigation "was brought to change a pattern of hiring and promotion practices that had discriminated against black citizens in Birmingham for decades." 109 S.Ct. at 2200. Plaintiff

white firefighters were nonetheless held entitled to attack the consent decree which had ended the litigation and adopted a remedial program of affirmative action. The consent decree entered in Delaware, in which no recovery was had for any of the plaintiff shareholders or the corporation, but $700,000 in fees were awarded to "plaintiffs'" counsel, has no historic importance and fulfills no compelling national purpose. It should accordingly be given less, rather than more, preclusive effect than the Birmingham consent decree.

The defense that the objections made by plaintiffs to the Delaware consent decree are sufficient to give it *res judicata* effect parallels to the unsuccessful arguments of those who would bind the white firefighters by the consent decree to which they were not parties. The dissenting Justices in *Martin* stressed the careful consideration given by the District Court to the objections stated by the white firefighters, represented in part by the Birmingham Firefighters Association, who

objected to the decree. The dissenters noted that the Court found that the litigation would probably be held liable eventually for discrimination, and that the remedies adopted in the consent decree were 'reasonably commensurate with the nature and extent of the indicated discrimination.' 109 S.Ct. at 2192 (quoting District Court). Under the highly limited standard of review accorded to plaintiffs' objections in Delaware, they should not be any more bound by having stated those objections, than were the white firefighters who stated objections to the Birmingham consent decree.

Moreover, in arguing that the Birmingham consent decree should bind the white firefighters who later opposed it, the dissenters made particular note of the observation of the trial court 'that there is no contention or suggestion that the settlements are fraudulent or collusive.' 109 S.Ct. at 4621 (quoting District Court).

> The implementation of a consent decree affecting the interests of a multitude of nonparties, and the reliance on that decree as a defense to a charge of discrimination in hiring and promotion decisions, raise a

> legitimate concern of collusion. No such allegation, however, has been raised. Moreover, there is compelling evidence that the decree was not collusive.

109 S.Ct. at 2196. In contrast, plaintiffs indeed alleged that the Delaware consent decree was collusive, and that the only beneficiaries were the attorneys for the settling plaintiffs who received $700,000 in legal fees under the settlement. (R. 112-113, 121-122, 134-137, 219)

This Court has shown special concern that shareholders' derivative suits not be too easily dismissed. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 86 S.Ct. 845 (1966). The Court should take this opportunity to determine whether the due process protections and relief from *res judicata* afforded to firefighters who did not timely seek intervention before settlement of a civil rights action remedying past discrimination should apply to plaintiff shareholders who *did* timely seek intervention before settlement of a derivative action brought by other shareholders.

CONCLUSION

For all of the reasons contained herein, a writ of *certiorari* should be issued to the Court of Appeals of the State of New York.

Dated: New York, New York
December 12, 1989

Respectfully submitted,

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APPENDIX

SUPREME COURT : NEW YORK COUNTY DM 13
IAS : PART 9
----------X

MIRIAM GELBAND and LEO KAYSER, III,
Individually and as shareholders of
TEXACO INC., suing on behalf of
themselves and in the right of and
for the benefit of TEXACO INC.,

Plaintiffs, Index No.
12502/84

-against-

TEXACO INC., JOHN K. McKINLEY, WILLARD C. BUTCHER, FRANK T. CARY, ALFRED C. DeCRANE, JR., THE EARL OF GRANARD, JAMES W. KINNEAR, ELVIS L. MASON, THOMAS H. MOORER, THOMAS S. MURPHY, GEORGE PARKER, JR., LORENE L. ROGERS, ROBERT V. ROOSA, FRANZ H. ULRICH, THOMAS A. VANDERSLICE and WILLIAM WRIGLEY,

Defendants.
----------X

ANDREW R. TYLER, J.:

This is a motion by defendants for dismissal of the complaint in this action, commenced by the plaintiffs Gelband and Kayser, shareholders of defendant Texaco, Inc. in their own behalf and on behalf of Texaco, against the president (McKinley) and the defendants directors of Texaco, pursuant to CPLR 3211 (a) 5 upon the ground that the action is barred by res judicata. In the alternative they seek summary judgment upon the same ground.

Plaintiffs are holders of common shares of defendant, Texaco, Inc. and commenced this derivative action pursuant to section 626 of the Business Corporation Law, against the president and present and past directors. In the complaint they allege that there has been a gross waste of corporate assets, a breach of fiduciary duty and that defendants carried out a discriminatory business transaction by repurchasing (approximately 10%) of the outstanding shares of Texaco, Inc. from a shareholder, Bass Bros. Entertainment, Inc. at a price far in excess of the market value. $50 per share was paid for the stock around March 6, 1984 and the shares closed at $42.625 that day and subsequently dropped to $40.00 per share. They are seeking to recover damages and an order rescinding the Texaco-Bass purchase transaction or, in the alternative, an order directing defendants to purchase plaintiffs' shares (and those of other shareholders) upon the same terms as those of Bass were purchased. They also seek an award of attorneys fees, costs and disbursements.

Texaco is a Delaware corporation. A number of actions, later consolidated were instituted in the Court of the Chancery of the State of Delaware. Plaintiffs herein were not named as parties there but the action Good, etal v Texaco, Inc., etal (consolidated action) was a class action and shareholder derivative action which defendants argue is similar if not identical to the within action since the Good action was also directed at the March 6, 1984 offer and later purchase of Bass stock, as grossly excessive, a gift of Texaco's assets, an illegal vote buying scheme and a breach of fiduciary duty, among other allegations. Also there was an allegation of illegal discriminatory dividends payable to some but not all the common shareholders of Texaco. An injunction of defendants was sought in the Good action, a recission of the Bass Transaction, a declaratory judgment that anti takeover amendments were illegal null, and void, and an

accounting by Texaco directors and Bass, and reasonable fees for attorneys, accountants, and experts.

Plaintiffs participated, although not entirely, in discovery in the Delaware action. Non Delaware actions were also pending. Parties entered into a stipulation of compromise and settlement, subject to the approval of the Delaware court. The stipulation provided among other things that the Texaco-Bass repurchase agreement would be modified to eliminate the alleged illegal vote-buying scheme in that the eight Bass defendants would be required to vote their preferred Texaco stock: "proportionally to the votes cast by the Texaco common stockholders" instead of in accordance with the recommendation of Texaco director defendants; dismissing the Delaware action as to defendants, and with prejudice as to plaintiffs; and permanently barring and enjoining plaintiffs, all members of the class, all Texaco stockholders "from instituting or prosecuting any other actions in any court in Delaware or any other jurisdiction based upon or for the purpose of enforcing any claim ... within the scope of the pleadings..." It provided for an award of legal fees of $700,000 and of disbursements to plaintiffs attorneys upon application to the Delaware court; that directors defendants would pay disbursements and 78.57% of legal fees while Bass defendants would pay 21.43% of legal fees; that Texaco would pay all costs of settlement and administration.

Plaintiffs Gelband and Kayser were not notified of settlement negotiations and state that merely Notice of Settlement and hearing was sent out to them dated November 14, 1984. They filed a memorandum of law in opposition to the settlement and their counsel appeared at the settlement hearing and argued against it.

The settlement was approved by the Delaware court on 2/19/85.- The movants herein assert: that plaintiffs' (Gelband and Kayser) claims were rejected that the

Texaco Board in repurchasing the Bass shares was motivated by their desire to protect their positions on the board but that the Board was attempting to avert a hostile takeover and direct its efforts to integrating recently acquired Getty Oil Co. into its operations. An order and judgment approving the settlement and dismissing the consolidated actions with prejudice against all plaintiffs was entered on March 12, 1985; that the order and judgment was affirmed on March 10, 1986 (upon appeal) by the Delaware Supreme Court.

Plaintiffs assert that the judgment pursuant to (consent) stipulation of settlement in the Delaware Court was never decided on the merits, leaving many legal and factual issues to be decided and that plaintiffs' motion to intervene in that action was denied; that plaintiffs were never notified of settlement negotiations or accorded procedural due process; that defendants are stopped by the Good decision from pursuing this motion to dismiss. Plaintiffs state that they engaged in discovery (in Delaware case); that plaintiffs were excluded from settlement negotiations and the first notice they received was mailed on 11/14/84. They state that they were enjoined by the Delaware court from proceeding on their motion for partial summary judgment in this Court (NY) and were forced to seek intervention in the Delaware action; that they were denied procedural due process in that they were given no notice of negotiations or execution of the stipulation of settlement. They assert that the hearing on the proposed settlement was not an evidentiary one, requiring witnesses and testimony.

Defendants argue that the Full Faith and Credit Clause of the US Const. (US Const. Art. IV, Sect. 1) prohibits this complaint upon a showing that the requirements of the Due Process Clause were met in the court of the sister state (Delaware); that plaintiffs Gelband and Kayser received notice of the proceedings; their interests were represented and they were afforded an

opportunity to be heard. Plaintiffs Gelband and Kayser on the other hand have asserted that they were denied due process in the Delaware consolidated action in various respects, including the refusal by the court to permit them to intervene, the failure to provide an evidentiary hearing, and the failure of defendants to notify these New York plaintiffs of settlement negotiations.

The following has been stated:

> "The general principle is that no person may be bound by an in personam judgment in litigation in which he has not been designated a party nor been served with process. However, the class action has long been recognized as an exception to this rule and, provided the requirements of due process have been met, the judgment in a class action may bind members of the class who were represented but not made parties to the suit...: (2 Weinstein-Korn-Miller NY Civ Prac., par. 905.03).

and

> "One of the most important requirements of due process is...that the class have been adequately represented.."

Further, CPLR 908 by requiring court approval prior to dismissal, discontinuance and compromise of class actions insures that individual rights of members of

the class are not impaired by the settlement, etc. unless they have been given sufficient opportunity to object.

Under the Full Faith and Credit Clause of the US Constitution (US Const., Art IV, Section 1), each state is required to give effect to the public acts, records, and judicial proceedings of every other state.

There is a presumption that the judgment of a sister state is valid and binding; that the court had jurisdiction over the parties, and acted in accordance with the applicable rules of practice and procedure, the burden being upon the one questioning the foreign judgment, to show otherwise (9 Carmody-Wait 2d section 63:245). As long as the court of the sister state had jurisdiction, its judgment cannot be impeached "by showing irregularities in the form of the proceeding, or by proof of noncompliance with some law of the state..." (9 Carmody-Wait 2d, supra).

Where a judgment of a court of another state is entitled to Full Faith and Credit, New York Courts are precluded from any inquiry into the merits of the cause of action, logic or consistency of the decision, validity of legal principles on which the judgment was based (Re Morgan Guaranty Trust Co., 28 NY2d 155 cert den 404US826).

The function of the Full Faith and Credit Clause is to avoid relitigation of issues in other states which have already been litigated.

Although the plaintiffs herein have asserted that their motion to intervene was denied, they were permitted to argue and object at the hearing on the settlement and to intervene to the extent that they appealed the judgment to the Supreme Court of Delaware in which it was affirmed.

The hearing on the proposed settlement was conducted on 12/20/84. The settlement had not provided a direct monetary award to the shareholders or Texaco. After Chancellor Brown rendered his opinion February 19, 1985 approving it as fair and reasonable, and denying objections (inclusive of Gelband and Kayser), the order and judgment was signed.

This court determines that the stockholder proceedings in the Delaware Courts are entitled to Full Faith and Credit and as such bar the instant action. The order and judgment of March 12, 1985 was subsequently affirmed by the Supreme Court of the State of Delaware on March 10, 1986. Texaco was incorporated pursuant to the laws of Delaware. There is no question of the Court's (Delaware) jurisdiction over the parties and the subject matter which was being litigated. The complaint herein alleges that plaintiff Kayser is a New York resident. Gelband and Kayser have not raised claims herein that are separate and distinct from those upon which the Delaware actions were based, all turning upon the propriety of the Texaco-Bass transaction of March 6, 1984. Chancellor Brown there found that the settlement was fair and reasonable while noting that the plaintiffs (Shareholders) there were not persuaded that they would ultimately prevail on the merits because of the "business judgment rule" defense asserted by the defendants.

Accordingly, the motion by defendants for dismissal is granted.

Settle order.

DATED: AUGUST 14, 1986.

/s/ A. R. T.

J. S. C.

At an Individual Assignment Part 9 of the Supreme court, held in and for the County of New York at the County Courthouse, 60 Centre Street, New York, New York, on the 15 day of September, 1986.

PRESENT: HON. ANDREW R. TYLER, Justice

- -x

MIRIAM GELBAND and LEO KAYSER, III Individually and as Shareholders of TEXACO INC., suing on behalf of themselves and in the right of and for the benefit of TEXACO INC.,

Plaintiffs,

Index No. 12502/84

-against-

ORDER

TEXACO INC., JOHN K. McKINLEY, WILLARD C. BUTCHER, FRANK T. CARY, ALFRED C. DeCRANE, JR., THE EARL OF GRANARD, JAMES W. KINNEAR, ELVIS L. MASON, THOMAS H. MOORER, THOMAS S. MURPHY, GEORGE PARKER, JR., LORENE L. ROGERS, ROBERT V. ROOSA, FRANZ H. ULRICH, THOMAS A. VANDERSLICE and WILLIAM WRIGLEY,

Defendants.

- -x

The Defendants Texaco Inc., John K. McKinley, Willard C. Butcher, Frank T. Carey, Alfred C. DeCrane,

Jr., The Earl of Granard, James W. Kinnear, Elvis L. Mason, Thomas H. Moorer, Thomas S. Murphy, George Parker, Jr., Lorene L. Rogers, Robert V. Roosa, Frank H. Ulrich, Thomas A. Vanderslice, and William Wrigley, having duly moved, pursuant to CPLR 3211, for an order dismissing the complaint in this action with prejudice on the ground that the claims herein are barred under the doctrine of res judicata by a judgment entered in related litigation in the Delaware Court of Chancery on March 12, 1985, or, in the alternative, for and order pursuant to CPLR 3212 granting summary judgment in favor of the defendants on the same grounds;

Now, upon reading and filing:

(a) Plaintiffs' summons and complaint dated March 22, 1984 and notice of motion for dismissal or in the alternative for summary judgment dated April 15, 1986;

(b) the affidavit of Eric M. Roth in support of defendants' motions sworn to on April 15, 1986, and the exhibits thereto;

(c) the affidavit affirmed under penalties of perjury of H. Miles Jaffe in opposition to the defendants' motion dated May 1, 1986 and the exhibits thereto;

(d) the affidavit of Rodman Ward, Jr. in support of the defendants' motions sworn to on June 9, 1986 and the exhibit thereto; and

(e) all of the pleadings and prior proceedings heretofore had herein;

And after due deliberation being had thereon, The Honorable Andrew R. Tyler having rendered an Opinion dated August 14, 1986;

Now, upon the motion of Skadden, Arps, Slate, Meagher, & Flom, attorneys for the defendants, it is:

ORDERED, that the motion of the defendants to dismiss the complaint with prejudice is granted; and it is further

ORDERED, that the complaint in this action herein be, and the same hereby is, dismissed with prejudice pursuant to CPLR 3211 (a) (5); and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:

/s/ A. R. T.

J. S. C.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 19, 1988

Present--Hon. Leonard H. Sandler Justice Presiding
John Carro
Bentley Kassal
Ernst H. Rosenberger
George Bundy Smith Justices

Miriam Gelband and Leo Kayser, III, Individually and as Shareholders of Texaco Inc., suing on behalf of themselves and in the right of and for the benefit of Texaco Inc.,

Plaintiffs-Appellants,

against

Texaco Inc., John K. McKinley, Willard C. Butcher, Frank T. Cary, Alfred C. DeCrane, Jr., The Earl of Granard, James W. Kinnear, Elvis L. Mason, Thomas H. Moorer, Thomas S. Murphy, George Parker, Jr., Lorene L. Rogers, Robert V. Roosa, Franz H. Ulrich, Thomas A. Vanderslice and William Wrigley, 29825

Defendants-Respondents.

An appeal having been taken to this Court by the plaintiffs-appellants

from an order of the Supreme Court, New York County

(Andrew Tyler, J.), entered on October 3, 1986,

and said appeal having been argued by Leo Kayser, III,

of counsel for the appellants, and by Barry H. Garfinkel,

of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order

so appealed from be and the same is hereby affirmed. Respondents shall recover of appellants $75 costs and disbursements of this appeal.

ENTER:

HAROLD J. REYNOLDS

Clerk

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals in the City of Albany on the twenty-second day of September A.D. 1988

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

Mo. No. 1109 SSD 79

Miriam Gelband et al.
Appellants,

v.

Texaco Inc., et al.,
Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court

sua sponte, upon the ground that no substantial constitutional question is directly involved.

/s/Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals in the City of Albany on the fifteenth day of June A.D. 1989

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

1-10 Mo. No. 296
Miriam Gelband et al.
Appellants,
v.

Texaco Inc., et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals in the City of Albany on the fourteenth day of September A.D. 1989

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

Mo. No. 298
Miriam Gelband et al.
Appellants,

v.

Texaco Inc., et al.,
Respondents.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

Supreme Court, U.S.
FILED
JAN 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-981

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

MIRIAM GELBAND and LEO KAYSER, III,
Individually and as Shareholders of TEXACO INC.,
suing on behalf of themselves and in the right of
and for the benefit of TEXACO INC.,

Petitioners,

v.

TEXACO INC., JOHN K. MCKINLEY,
WILLARD C. BUTCHER, FRANK T. CARY, ALFRED C. DECRANE,
JR., THE EARL OF GRANARD, JAMES W. KINNEAR, ELVIS L.
MASON, THOMAS H. MOORER, THOMAS S. MURPHY, GEORGE
PARKER, JR., LORENE L. ROGERS, ROBERT V. ROOSA, FRANZ H.
ULRICH, THOMAS A. VANDERSLICE and WILLIAM WRIGLEY,

Respondents.

Brief in Opposition to Petition For a Writ of Certiorari to The Court of Appeals of the State of New York

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QUESTIONS PRESENTED

1. Where shareholders in a consolidated class and derivative action in the Delaware courts had notice of a proposed settlement, were represented at the settlement hearing, participated in the settlement process as objectors, expressly limited their challenge to the settlement to raising a narrow question of Delaware law and declined wider participation, and the Delaware courts twice considered and rejected the shareholders' argument on its merits (both at the trial court level and on appeal before the Supreme Court of Delaware), did the New York courts properly rule that the Full Faith and Credit Clause of the United States Constitution and principles of *res judicata* bar these shareholders from relitigating the same derivative claims in New York?

2. Where shareholders failed to raise any due process objections to the participation granted them as objectors to a proposed settlement of a consolidated class and derivative action in Delaware, and abandoned on appeal in Delaware any objection to the trial court's refusal to grant their motion to intervene, may they raise these due process objections for the first time in a collateral action in an effort to avoid the force of the Full Faith and Credit Clause?

LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO INC.

Pursuant to Supreme Court Rule 29.1, the affiliates and subsidiaries of Texaco Inc. listed on its most recent Form 10-K filed with the Securities and Exchange Commission which continue to be affiliated with Texaco Inc. are as follows:

Getty Oil Company
Texaco Cogeneration Company
Texaco Pipeline Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
Norsk Texaco Oil A/S
S. A. Texaco Belgium N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S. A.
Refineria Texaco de Honduras, S. A.
Texaco Brasil S. A.—Productos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Puerto Rico Inc.
Texaco Trinidad, Inc.
Texas Petroleum Company
Texaco Chemical Company
Texas International Financial Corporation
Texaco International Trader Inc.

Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

In addition, the following are currently subsidiaries or affiliates of Texaco Inc.:

Canada Texaco Inc.
Four Star Oil & Gas Company
Texaco Canada Petroleum Inc.
Texaco Refining and Marketing Holdings Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO INC.	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS AND JUDGMENTS BELOW	1
INTRODUCTION	2
STATEMENT OF THE CASE	4
1. The Parties	4
2. Shareholders Challenge The Bass Stock Repurchase: The Delaware Action	5
3. Petitioners Commence, But Fail To Prosecute, Their New York Derivative Action	5
4. The Settlement Of The Delaware Action	6
5. Petitioners Object To The Settlement And Move To Intervene In The Delaware Action	6
6. The Court of Chancery Approves The Settlement Of The Delaware Action And Denies Petitioners' Motion To Intervene	8
7. Petitioners Appeal To The Supreme Court Of Delaware, But Abandon Their Motion To Intervene	9
8. The Supreme Court Of Delaware Rejects Petitioners' Legal Argument On The Merits	10

Page

9. The New York Trial Court Properly Applies Principles Of Full Faith And Credit And *Res Judicata* In Dismissing The New York Derivative Action 11

10. The New York Appellate Division Affirms The Dismissal Of Petitioners' New York Complaint 11

11. The New York Court Of Appeals Rejects Petitioners' Appeal Three Times 12

REASONS FOR DENYING THE WRIT 13

I. THE DISMISSAL OF THE NEW YORK DERIVATIVE ACTION DOES NOT RAISE AN IMPORTANT FEDERAL QUESTION OF DUE PROCESS 13

A. Well-Settled Principles Of Full Faith And Credit Required Dismissal Of The New York Derivative Action 14

B. Petitioners Failed To Preserve Their Due Process Arguments For Review By This Court 19

C. In The Delaware Action, Petitioners Received, As Objectors, All The Due Process Protections Requested By Them—And More 21

D. Petitioners' Other Claims Are Without Substance 23

1. The Opt-Out Argument 24

2. The Standard Of Review Argument 25

II. THE DISMISSAL OF PETITIONERS' NEW YORK DERIVATIVE ACTION IS NOT INCONSISTENT WITH *MARTIN V. WILKS* 26

CONCLUSION 30

TABLE OF CASES AND AUTHORITIES

PAGE

CASES

Alaniz v. California Processors, Inc., 73 F.R.D. 289 (N.D. Cal. 1976), *aff'd sub nom. Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978) ..... 22n.

In re Antibiotic Antitrust Actions, 333 F. Supp. 296 (S.D.N.Y.), *aff'd sub nom. Connors v. Chas. Pfizer & Co.*, 450 F.2d 1119 (2d Cir. 1971), *cert. denied*, 408 U.S. 930 (1972)..... 20

Bennett v. Behring Corp., 737 F.2d 982 (11th Cir. 1984)..... 25

Bennett v. Propp, 187 A.2d 405 (Del. 1962)..... 7

In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*,__ U.S. __, 109 S. Ct. 2180 (1989) ..... 29n.

Brown v. Georgia Power Co., 371 F. Supp. 543 (S.D. Ga. 1973), *aff'd*, 491 F.2d 117 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974) 20

Cardinale v. Louisiana, 394 U.S. 437 (1963) 19, 20, 24

Cheff v. Mathes, 199 A.2d 548 (Del. 1964) 7

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) ..... 26n.

Commissioner v. Sunnen, 333 U.S. 591 (1948) .. 14n.

Cromwell v. County of Sac, 94 U.S. 351 (1877) 14n.

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 19

Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295 (9th Cir. 1981) 20

Epstein v. Chatham Park, Inc., 153 A.2d 180 (Del. Super. Ct. 1959) 14

Ezzes v. Ackerman, 234 A.2d 444 (Del. 1967) ... 14, 15, 17

	PAGE
Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	14n., 17
In re Four Seasons Sec. Laws Litig., 502 F.2d 834 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974)	16n.
Geller v. Tabas, 462 A.2d 1078 (Del. 1983)	16
In re General Tire & Rubber Co. Sec. Litig., 726 F.2d 1075 (6th Cir.), *cert. denied*, 469 U.S. 858 (1984)	21, 22, 25n.
Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975)	25
Guenther v. Pacific Telecom, Inc., 123 F.R.D. 341 (D. Or. 1987)	24
Hansberry v. Lee, 311 U.S. 32 (1940)	15, 16n.
Hill v. California, 401 U.S. 797 (1971)	19
Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322 (10th Cir. 1984)	22, 23
King v. South Central Bell Telephone & Telegraph Co., 790 F.2d 524 (6th Cir. 1986)	15
Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982)	14
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	20n.
Maher v. Zapata Corp., 714 F.2d 436 (5th Cir. 1983)	15, 16
Malonado v. Flynn, 417 A.2d 378 (Del. Ch. 1980)	14
Martin v. Wilks, ___U.S.___, 109 S. Ct. 2180 (1989)	4, 13, 16, 26-29
Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984)	14
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	21n.
Nathan v. Rowan, 651 F.2d 1223 (6th Cir. 1981)	16

	PAGE
Neponsit Inv. Co. v. Abramson, 405 A.2d 97 (Del. 1979)	17n., 25
Nottingham Partners v. Dana, 564 A.2d 1089 (Del. 1989)	18
Officers for Justice v. Civil Serv. Comm'n of San Francisco, 473 F. Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983)	22n.
Parker v. Hoefer, 2 N.Y.2d 612, 162 N.Y.S.2d 13, *cert. denied*, 355 U.S. 833 (1957)	14
Penson v. Terminal Transport Co., 634 F.2d 989 (5th Cir. 1981)	15
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)	24
Polk v. Good, 507 A.2d 531 (Del. 1986)	2, 17n.
Rome v. Archer, 197 A.2d 49 (Del. 1964)	7n., 15n., 17n., 25
Ross v. Bernhard, 396 U.S. 531 (1970)	26
Smith v. Allegheny Corp., 394 F.2d 381 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968)	15, 16
Society Hill Civic Ass'n v. Harris, 632 F.2d 1045 (3d Cir. 1980)	27n.
Stilwell v. Parsons, 145 A.2d 397 (Del. 1958)	20
Stotts v. Memphis Fire Dep't, 679 F.2d 579 (6th Cir.), *cert. denied*, 459 U.S. 969 (1982)	22n.
Street v. New York, 394 U.S. 576 (1969)	19
Tacon v. Arizona, 410 U.S. 351 (1973)	19
Thomas v. Arn, 474 U.S. 140 (1985)	20n.
Valerio v. Boise Cascade Corp., 80 F.R.D. 626 (N.D. Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981)	15
In re Warner Communications Sec. Litig., 798 F.2d 35 (2d Cir. 1986)	25-26

	PAGE
Webcor Electronics v. Whiting, 101 F.R.D. 461 (D. Del. 1984)	21, 22, 25n.
Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983)	25
STATUTES AND RULES	
Fed. R. Civ. P. 23	6n., 17, 28
Fed. R. Civ. P. 23.1	*passim*
Del. Chancery Court Rule 23	6n., 17, 28
Del. Chancery Court Rule 23.1	*passim*
N.Y. Civ. Prac. L. & R. 5601 (McKinney 1989)	12
N.Y. Civ. Prac. L. & R. 5602 (McKinney 1989)	13n.
N.Y. Court of Appeals Rule 500.11(d)(1)(v) (McKinney 1989)	13n.
CONSTITUTIONAL PROVISIONS	
Full Faith and Credit Clause, U.S. Const. Art IV, § 1	*passim*
OTHER AUTHORITIES	
3B J. Moore & J. Kennedy, *Moore's Federal Practice* (2d ed. 1985)	26
7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* (2d ed. 1986)	17
Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (1975)	17

No. 89-981

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

MIRIAM GELBAND and LEO KAYSER, III,
Individually and as Shareholders of TEXACO INC.,
suing on behalf of themselves and in the right of
and for the benefit of TEXACO INC.,

Petitioners,

v.

TEXACO INC., JOHN K. MCKINLEY,
WILLARD C. BUTCHER, FRANK T. CARY, ALFRED C. DECRANE,
JR., THE EARL OF GRANARD, JAMES W. KINNEAR, ELVIS L.
MASON, THOMAS H. MOORER, THOMAS S. MURPHY, GEORGE
PARKER, JR., LORENE L. ROGERS, ROBERT V. ROOSA, FRANZ H.
ULRICH, THOMAS A. VANDERSLICE and WILLIAM WRIGLEY,

Respondents.

Brief in Opposition to Petition For a Writ of Certiorari to The Court of Appeals of the State of New York

OPINIONS AND JUDGMENTS BELOW

This case involves a collateral attack in New York upon an Order and Final Judgment of the Delaware Court of Chancery, dated March 12, 1985, approving the settlement of a consolidated class and derivative action, *Good v. Texaco Inc.*, Consolidated C.A. No. 7501 (Del. Ch.). The Order and Final Judgment and the accompanying opinion of the

Delaware Court of Chancery are unreported, but were reproduced at pages 141-45 and 95-140 of the Record on Appeal in the Supreme Court of the State of New York, Appellate Division.

The opinion of the Supreme Court of Delaware affirming the March 12, 1985 Order and Final Judgment is reported as *Polk v. Good*, 507 A.2d 531 (Del. 1986). In addition, a copy of the opinion was reproduced at pages 190-207 of the Record on Appeal in the Supreme Court of the State of New York, Appellate Division.

The orders and opinions of the New York courts are reproduced in the Petitioners' Appendix (at pages A-1 through A-18).

INTRODUCTION

Petitioners ask this Court to review an order of the Court of Appeals of the State of New York that rejected Petitioners' attempt to relitigate certain shareholders derivative claims that were settled almost five years ago in a combined class and derivative action in state court in Delaware (the "Delaware Action").[1] Finding that Petitioners had fully participated in the Delaware Action as objectors, a New York trial court ruled that Petitioners' collateral attack on the Delaware judgment, which was affirmed by the Supreme Court of Delaware, was barred by principles of full faith and credit and *res judicata*. The New York appellate courts rejected Petitioners' appeal four times.

Petitioners now claim that the New York courts erred in giving full faith and credit to the Delaware judgment approving the settlement of the Delaware Action (the "Delaware Judgment") because Petitioners somehow did not receive due process in Delaware. This Court should reject that claim, and refuse to grant the writ of certiorari, for at least four reasons.

[1] Counsel of record designated below received the Petition through the mails on December 15, 1989.

First, the New York courts' application of principles of full faith and credit and *res judicata* is consistent with well-settled precedent and raises no important federal question of due process.

Second, Petitioners waived their due process arguments when, in the course of their full participation in the Delaware Action as objectors, they failed to raise any of these arguments in the Delaware Court of Chancery or in the Delaware Supreme Court (or in a petition for a writ of certiorari to the Delaware Supreme Court following that court's affirmance of the Delaware Judgment).

Third, Petitioners' due process claims are utterly without merit. Petitioners now contend that their due process rights were violated primarily because they were denied leave to intervene in the Delaware Action. But, throughout five years of appeals and attempts to attack collaterally the Delaware Judgment, Petitioners have *never* identified a single argument that they could have made or procedure that they could have invoked as "intervenors" in the Delaware Action that they were not allowed to make or invoke as "objectors." Nor could they. Petitioners received notice of the proposed settlement of the Delaware Action and of the court hearing to consider its fairness, appeared at the hearing as objectors, and were offered an opportunity to take discovery and present evidence to the court. Having attended only two of a number of pre-hearing depositions, Petitioners expressly declined to take further discovery and asked instead only for the right to brief and argue a single question of Delaware corporate law based upon the factual record already developed. The Delaware Court of Chancery accepted Petitioners' briefs and heard oral argument from them. When the court rejected their single legal argument on the merits and denied leave to intervene, Petitioners appealed to the Delaware Supreme Court, which also heard their legal argument and rejected it on the merits. Moreover, Petitioners never asked the Delaware Supreme Court to review the Chancery Court's denial of their request to intervene.

In short, even as "objectors" rather than "intervenors," Petitioners received everything they sought in Delaware. Petitioners now claim, for the first time, that they also were denied due process because they did not have the right to "opt out" of the settlement of the Delaware Action. But, Petitioners never asked to "opt out" of the Delaware Action; having failed to raise this claim before, they cannot raise it here for the first time. Moreover, as we explain below, this "opt out" claim, in the context of a derivative action, is without merit.

Fourth, the supposed "conflict" Petitioners have manufactured between the decision of the New York courts granting full faith and credit to the Delaware Judgment and this Court's decision in *Martin v. Wilks*, __U.S. __, 109 S. Ct. 2180 (1989) is, as we demonstrate below, illusory and does not provide a basis for this Court's review.

In sum, the dismissal of Petitioners' New York derivative action was compelled by the doctrines of full faith and credit and *res judicata*. Even if Petitioners properly preserved their due process claims, the order of the New York Court of Appeals rejecting these claims neither raises an important federal question nor conflicts with this Court's settled precedent.

STATEMENT OF THE CASE

1. The Parties

Petitioners Miriam Gelband and Leo Kayser, III allege that they own 100 and 800 shares, respectively, of common stock of Respondent Texaco Inc. ("Texaco"), a Delaware corporation. (R. 9, 16, 24)[2] The Individual Respondents were

[2] Citations to the Record on Appeal in the Supreme Court of the State of New York, Appellate Division, will be cited as "R. _ ". Citations to the Petitioners' Appendix to the Petition for a Writ of Certiorari will be cited as "A. _ ". Citations to the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York will be cited as "Petition at _ ".

members of the Board of Directors of Texaco at all times relevant to this action. (R. 24)

2. Shareholders Challenge The Bass Stock Repurchase: The Delaware Action

This action arises out of Texaco's March 6, 1984 repurchase of approximately 9.9% of Texaco's outstanding common stock from a group of Texaco shareholders (the "Bass Stock Repurchase"). (R. 33, 100, 103-04) Following the announcement of the Bass Stock Repurchase, many Texaco shareholders commenced litigation against Texaco and the group that sold its shares to Texaco, claiming that, among other things, the Texaco Board of Directors had breached its fiduciary duty by approving the repurchase. The first of these shareholder actions was filed in the Delaware Court of Chancery one day after the Bass Stock Repurchase. (R. 105) Fourteen other actions — asserting individual claims on behalf of Texaco shareholders and derivative claims on behalf of Texaco — were filed in Delaware and eventually consolidated in the Court of Chancery under the caption *Good v. Texaco Inc.*, Consolidated C.A. No. 7501 (the "Delaware Action"). (R. 9, 105)

3. Petitioners Commence, But Fail To Prosecute, Their New York Derivative Action

Petitioners filed this shareholders derivative action in the Supreme Court of the State of New York (the "New York derivative action") three weeks after the *Good* complaint was filed in Delaware. Petitioners' complaint, like the complaint in the Delaware Action, asserted derivative claims on behalf of Texaco, claiming that the Bass Stock Repurchase was a waste of Texaco's corporate assets, constituted a breach of Texaco's directors' fiduciary duties and was impermissibly discriminatory under Delaware corporate law. (R. 16-22, 35-36, 86-87, 105, 149)

While the plaintiffs in the consolidated Delaware Action conducted extensive discovery (R. 36), Petitioners conducted virtually no discovery in their New York derivative action. (R. 36-37) Although Petitioners were kept advised of and were invited to participate in the discovery being conducted in the Delaware Action (R. 279), they declined this invitation, except to send counsel (who chose not to ask any questions) to just two of the six depositions. (R. 36, 279-80)

4. The Settlement Of The Delaware Action

After six months of discovery, including depositions and the production of thousands of documents, the parties reached a proposed settlement of the consolidated Delaware Action and certain other related actions. (R. 10-11, 36-37, 109-10, 196-97) Pursuant to well-established procedures,[3] Texaco mailed to all of its shareholders a comprehensive notice of a hearing on the proposed settlement. (R. 37, 45-48) The notice advised shareholders (including Petitioners) that the failure to appear at the hearing in the Delaware Court of Chancery to object to the proposed settlement could result in a waiver of all rights to object in any other proceeding. (R. 37, 47-48)

5. Petitioners Object To The Settlement And Move To Intervene In The Delaware Action

Petitioners took advantage of the Delaware procedures by moving to intervene as plaintiffs in the Delaware Action and by objecting to the settlement of the derivative claim asserted therein. (R. 38, 71-85, 86-94) Although Petitioners could have requested additional discovery and could have presented any

[3] Delaware Chancery Court Rules 23 and 23.1, identical in substance to the corresponding Federal Rules of Civil Procedure, require notice and court approval of a proposed settlement of a class or derivative action.

matter relevant to the fairness of the settlement,[4] Petitioners expressly rejected further discovery and asked instead only to be allowed to present a single legal argument based upon facts which Petitioners admitted were "undisputed." (R. 72, 154, 391)[5]

Petitioners' single legal argument raised what Petitioners called a "very narrow issue" of Delaware law, namely, whether the "business judgment rule," as applied in *Cheff v. Mathes*, 199 A.2d 548 (Del. 1964) and *Bennett v. Propp*, 187 A.2d 405 (Del. 1962), prohibited directors from using corporate funds to repurchase the company's shares from a single group of shareholders. (*See* R. 151) Failing such a construction, Petitioners sought the reversal of the rule of law found in *Cheff* and *Bennett*.

In a colloquy with the Chancellor at the settlement hearing, Petitioners' counsel, Mr. Jaffe, expressly denied any need or desire to do anything other than submit a brief on this "very narrow issue" of Delaware law:

> MR. JAFFE: . . . We agree with Mr. Ward [an attorney for the Texaco defendants] that no substantial discovery is necessary . . . .
>
> * * *
>
> Thus, Your Honor, our position is simply that as plaintiffs we would like to intervene before this Court and have the opportunity *on the facts as they appear in this order* [the proposed order approving the settlement] to raise that question [the application of *Cheff v. Mathes*] before the courts of this state.

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[4] *See Rome v. Archer*, 197 A.2d 49, 57 (Del. 1964); Del. Chancery Court Rule 23(d).

[5] Although Petitioners now claim that they were denied due process because they could not "opt out" of the settlement of the derivative claims in the Delaware Action (Petition at 22-35), Petitioners never asked the Delaware Court of Chancery (or the Delaware Supreme Court) for permission to "opt out." Instead, as described below, they sought to—and did—participate actively in the Delaware Action.

* * *

MR. JAFFE: . . . We would like the opportunity to move for *partial summary judgment*. And let me be clear on that.

THE COURT: You would want the opportunity to do so if permitted to intervene?

MR. JAFFE: Yes.

THE COURT: Okay.

MR. JAFFE: *But without further discovery.*

(R. 387-91 (emphasis added))

The Court of Chancery allowed Petitioners to submit briefs and present oral argument on their "very narrow issue." (*See* R. 71-85)

6. The Court Of Chancery Approves The Settlement And Denies Petitioners' Motion To Intervene

In a comprehensive opinion, the Delaware Court of Chancery approved the settlement of the consolidated Delaware Action. (R. 95-140) In so doing, the Chancellor considered —and squarely rejected—Petitioners' arguments based upon the *Cheff* and *Bennett* decisions. (*See* R. 116-18, 132-34) (summarizing and rejecting Petitioners' arguments).

Having disposed of Petitioners' narrow legal challenge to the proposed settlement, the Chancellor recognized that intervention was unnecessary to Petitioners' continued prosecution of their objections before the Delaware Supreme Court:

> *I find no basis for granting the intervention sought by certain of the objecting shareholders.* To the extent that these shareholders feel that the rule embodied in *Cheff v. Mathes, supra,* should be reconsidered, this Court has no power to do so since that decision, as well as *Bennett v. Propp, supra,* are decisions of our Supreme Court which

> this Court lacks the power to overturn. *If these shareholders, as objectors to the proposed settlement, wish to seek appellate review of this Court's decision to approve the settlement and dismissal of the consolidated action for whatever their reasons, they are presumably free to do so.* At least it has been done many times before.

(R. 133-34) (emphasis added).

On March 12, 1985, the Court of Chancery entered an Order and Final Judgment (the "Delaware Judgment") approving the settlement and dismissing the Delaware Action "on the merits as to all of the Defendants and with prejudice against all of the plaintiffs, all members of the Class and all stockholders of Texaco." (R. 141-45)

7. Petitioners Appeal To The Supreme Court Of Delaware, But Abandon Their Motion To Intervene

Petitioners accepted the Chancellor's invitation and appealed from the Delaware Judgment to the Delaware Supreme Court. However, in their briefing and oral argument before the Delaware Supreme Court, Petitioners abandoned their challenge to the Chancellor's denial of their motion to intervene. Instead, as their opening brief in the Delaware Supreme Court makes clear, the *sole ground* for their appeal was the "very narrow" legal issue raised by Petitioners and rejected by the Court of Chancery:

> These objector/appellants submit this brief on the very narrow issue as to whether the Chancellor correctly interpreted the scope of the holdings in *Cheff v. Mathes*, Del. Supr., 199 A.2d 548 (1964); *Bennett v. Propp*, Del. Supr., 185 A.2d 405 (1962); *Kors v. Carey*, Del. Ch., 158 A.2d 136 (1960) as they relate to the right of directors to use corporate funds to buy out minority shareholding interests.

(R. 151)

In their briefs before the Delaware Supreme Court, Petitioners did not make any claim that they had been denied due process by the Court of Chancery, either by the denial of their motion to intervene, or otherwise. (R. 146-74, 175-89)

8. The Supreme Court Of Delaware Rejects Petitioners' Legal Argument On The Merits

After extensive briefing and oral argument in the Delaware Supreme Court, in which Petitioners fully participated (*see* R. 146-74 (opening brief); R. 175-89 (reply brief); R. 191 (indicating Petitioners' counsel's participation in oral argument)), on March 10, 1986, the Delaware Supreme Court affirmed the judgment approving the settlement of the Delaware Action. (R. 190-209) The Delaware Supreme Court specifically rejected Petitioners' argument on its merits:

> Appellants [Gelband and Kayser] contend that *Kors*, *Cheff*, and *Bennett v. Propp*, should not be interpreted to permit "greenmail," and should be limited to those instances where dissident shareholders threaten to interfere with the day-to-day business operations of a company. They argue that these cases do not sanction the repurchase at a premium of shares of those who threaten such activities as proxy fights and tender offers—the exercise of legitimate corporate "democratic processes". However, our recent decision in *Unocal* completely rejects that thesis, and we need not repeat it here. *Unocal*, 493 A.2d at 953-55. The Chancellor's conclusions were entirely consistent with the principles stated in *Unocal*.

(R. 203 (footnote omitted))[6]

Thereafter, Petitioners made no effort to obtain review in this Court of the Delaware Supreme Court's order affirming the Delaware Judgment — a judgment which Petitioners now claim was rendered without due process of law.

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[6] Accordingly, Petitioners' contention that they were denied the opportunity to be heard "on the merits of their claims" in the Delaware Action (Petition at 20) is flatly incorrect.

9. The New York Trial Court Properly Applies Principles Of Full Faith And Credit And *Res Judicata* In Dismissing The New York Derivative Action

On August 14, 1986, the Supreme Court of New York, County of New York (Tyler, J.), granted Respondents' motion to dismiss Petitioners' New York derivative action on grounds of *res judicata* and full faith and credit. (A. 1-7) Justice Tyler concluded that Petitioners' New York derivative action did nothing more than raise derivative claims respecting the Bass Stock Repurchase that already had been settled with court approval in the Delaware Action. (A. 6-7) Petitioners claimed that the New York court should not give full faith and credit to the Delaware Judgment because Petitioners did not receive due process in Delaware. However, Justice Tyler rejected Petitioners' argument, stressing their broad participation in the Delaware Action:

> Although the plaintiffs herein have asserted that their motion to intervene was denied, they were permitted to argue and object at the hearing on the settlement and to intervene to the extent that they appealed the judgment to the Supreme Court of Delaware in which it was affirmed.

(A. 6)

Justice Tyler concluded that the Delaware Judgment was entitled to full faith and credit, and dismissed Petitioners' derivative complaint on that basis. (A. 6-7)

10. The New York Appellate Division Affirms The Dismissal Of Petitioners' New York Complaint

In their arguments to the Supreme Court of New York, Appellate Division, First Department, Petitioners conceded that the Delaware courts had proper jurisdiction and committed no error in approving the settlement of the parallel shareholder lawsuits. (Reply Brief of Plaintiffs-Appellants in the Appellate Division, at 10) They also conceded that principles of *res judicata* ordinarily would bar Texaco shareholders from

relitigating issues settled in the Delaware Action. But, Petitioners claimed that they were exempt from those principles because they had not been allowed to intervene in the Delaware Action. (Reply Brief of Plaintiffs-Appellants in the Appellate Division, at 10) By Order dated May 19, 1988, the Appellate Division disagreed and unanimously affirmed the dismissal. (A. 12-13)

11. The New York Court Of Appeals Rejects Petitioners' Appeal Three Times

Petitioners next sought to appeal, as of right, to the Court of Appeals of the State of New York, on the ground that the Appellate Division's order "finally determine[d] an action where there is directly involved the construction of the constitution of the . . . United States." N.Y. Civ. Prac. L. & R. 5601 (McKinney 1989). In their required Jurisdictional Statement, Petitioners asserted, *inter alia*, that the Delaware courts had deprived them of due process "where there had been no opportunity to litigate on the merits in Delaware, and plaintiffs' application for leave to intervene in the Delaware action had been opposed by defendant and denied by the Delaware courts." (Appellants' Jurisdictional Statement in the N.Y. Court of Appeals, at 3) After full briefing of threshold jurisdictional issues, the Court of Appeals dismissed the appeal, *sua sponte*, on September 22, 1988, "upon the ground that no substantial constitutional question is directly involved." (A. 14-15)

Having failed to convince the New York Court of Appeals that their appeal presented a substantial constitutional question, Petitioners then sought a "second bite at the apple" by moving for leave to appeal to the Court of Appeals on the ground that their appeal presented important questions of New York common law.[7] The New York Court of Appeals denied that motion on June 15, 1989. (A. 16-17)

[7] A litigant in New York may seek leave to appeal to the Court of Appeals upon a showing that "the questions presented merit review by this

Petitioners then sought a "third bite at the apple" by moving to reargue the denial of leave to appeal on the ground the New York Court of Appeals had misapprehended or overlooked this Court's opinion in *Martin v. Wilks*, __ U.S. __, 109 S. Ct. 2180 (1989). After receiving the parties' submissions, the Court of Appeals denied that motion on September 14, 1989. (A. 18-19) The reargument motion represented the *seventh* occasion on which Petitioners had presented their grievances before the Delaware and New York courts over a period of more than five years.

REASONS FOR DENYING THE WRIT

I. THE DISMISSAL OF THE NEW YORK DERIVATIVE ACTION DOES NOT RAISE AN IMPORTANT FEDERAL QUESTION OF DUE PROCESS

The New York courts dismissed Petitioners' New York derivative action based upon a sound application of well-settled principles of *res judicata* and the Full Faith and Credit Clause of the United States Constitution. This case raises no important or novel issue of full faith and credit or due process. Rather, Petitioners, as objectors in Delaware, were afforded all that due process requires and, indeed, an opportunity for participation greater than they desired, and Petitioners never presented to the Delaware courts the due process claims on which they now seek certiorari.

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court, such as that they are novel or of public importance, or involve a conflict with prior decisions of this court, or there is a conflict among the [New York] Appellate Divisions." New York Court of Appeals Rule 500.11(d)(1)(v) (McKinney 1989). *See* N.Y. Civ. Prac. L. & R. 5602 (McKinney 1989).

A. Well-Settled Principles Of Full Faith And Credit Required Dismissal Of The New York Derivative Action

It is settled beyond question that the Full Faith and Credit Clause[8] required the New York courts to give the same preclusive effect to the Delaware Judgment that Delaware courts would give to that judgment. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 80-81 (1984); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982); *Parker v. Hoefer*, 2 N.Y.2d 612, 616, 162 N.Y.S.2d 13, 16 ("[A] judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata* in the absence of fraud or collusion, even if obtained upon default."), *cert. denied*, 355 U.S. 833 (1957).

In Delaware, a final judgment rendered by a court of competent jurisdiction is "an absolute bar to the maintenance of a second suit in a different court upon the same matter by the same party, or his privies." *Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. 1980) (quoting *Epstein v. Chatham Park, Inc.*, 153 A.2d 180, 184 (Del. Super. Ct. 1959)). Moreover, the "absolute bar" applies equally to claims that *were* and claims that *could have been* asserted in the original action. *Ezzes v. Ackerman*, 234 A.2d 444, 445-46 (Del. 1967).[9] Thus, the New York courts were bound by the Full Faith and Credit Clause to apply the absolute *res judicata* bar with respect to claims that Petitioners made or could have made in the Delaware Action.

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[8] The Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

[9] This Court has long recognized these same principles. *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("There is little to be added to the doctrine of *res judicata* as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.") (citing *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1877)).

Under Delaware law, a judgment entered upon a court-approved settlement of a class or derivative action has the same *res judicata* effect as a judgment entered after a trial. *Ezzes v. Ackerman*, 234 A.2d 444, 445 (Del. 1967).[10] Indeed, court-approved settlements of representative actions are universally accorded such *res judicata* effect. *See, e.g., King v. South Central Bell Telephone & Telegraph Co.*, 790 F.2d 524, 528-29 (6th Cir. 1986) (class action); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 648-49 (N.D. Cal. 1978) (class action), *aff'd*, 645 F.2d 699 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981); *Penson v. Terminal Transport Co.*, 634 F.2d 989, 996 (5th Cir. 1981) (class action); *Maher v. Zapata Corp.*, 714 F.2d 436 (5th Cir. 1983) (derivative action); *Smith v. Allegheny Corp.*, 394 F.2d 381 (2d Cir.) (derivative action), *cert. denied*, 393 U.S. 939 (1968).

The requirements of procedural due process in the context of settlement of a representative action are also well-settled. In *Hansberry v. Lee*, 311 U.S. 32 (1940), this Court acknowledged that due process in a "class" or "representative" suit is satisfied by notice to, and adequate representation of or participation by, class members:

> It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties. . . .

311 U.S. at 42-43. *See also Martin v. Wilks*, __ U.S. __, 109 S. Ct. 2180, 2184 n.2 (1989) (same).[11]

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[10] *See also Rome v. Archer*, 197 A.2d 49, 58 (Del. 1964) (derivative action) ("The lower court recognized, as do we, our responsibility to insure the fairness of the settlement in view of the *res judicata* effect of such settlement").

[11] As developed below, the dismissal of Petitioners' New York derivative action does not conflict with this Court's holding in *Martin v. Wilks*. *See* Point II, *infra*.

Following *Hansberry*,[12] courts have consistently held that due process in the context of a settlement of a class or derivative action requires only that shareholders receive (a) adequate notice of the proposed settlement, (b) adequate representation of their interests at settlement hearings, and (c) an opportunity to participate and be heard with respect to the settlement. *Smith v. Allegheny Corp.*, 394 F.2d 381, 391 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968); *Maher v. Zapata Corp.*, 714 F.2d 436, 450-53 (5th Cir. 1983); *Geller v. Tabas*, 462 A.2d 1078, 1083 (Del. 1983). *See also Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) (nonparty shareholders were bound by judgment in shareholder derivative action when representation was adequate).[13]

In the Delaware Action, Delaware Chancery Court Rules 23 (class actions) and 23.1 (shareholder derivative actions) gave Petitioners all of the safeguards required by due process, including (a) a representative party who fairly and

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[12] Petitioners suggest that *Hansberry* supports their argument in that "[o]n the particular facts in *Hansberry*, the Court found the judgment in the prior respresentative suit would not be accorded *res judicata* because this would deny due process to nonparties not adequately represented in the first action." (Petition at 17-18) Petitioners misconstrue *Hansberry*, which held only that the interests of the plaintiff property owners in the first and second actions were not sufficiently similar to render the first action a truly "representative" suit. 311 U.S. at 44. Here, in stark constrast to *Hansberry*, it cannot be disputed that the derivative claims asserted below in Petitioners' New York derivative action are identical to those derivative claims asserted in the Delaware Action.

[13] Petitioners' assertion that *Hansberry* leaves open to question the minimum due process guidelines in representative actions (Petition at 18) is therefore without merit. As Petitioners are forced to concede, it is well settled that "notice and adequacy of representation" are the "touchstones" of due process in this context. (Petition at 18 (quoting *In re Four Seasons Sec. Laws Litig.*, 502 F.2d 834 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974)). Moreover, it avails Petitioners nothing to bemoan the need for clarification of the "interrelationships" between these two guideposts (Petition at 18), because (a) Petitioners received notice of the settlement and (b) Petitioners do not—and cannot—challenge the "adequacy of representation" because they appeared as objectors in the Delaware Action *by their own counsel*.

adequately protected the interests of "absent" shareholders,[14] (b) notice of and an opportunity to object to the proposed settlement, and (c) a requirement that the court approve the settlement as fair. *See* Del. Chancery Court Rules 23(e), 23.1.[15] These Delaware Rules mirror Rules 23 and 23.1 of the Federal Rules of Civil Procedure, which "set [ ] out a procedure carefully designed to satisfy the due process requirements established by *Hansberry*." Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589, 592 (1974). *Accord* 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1789, at 251 (2d ed. 1986) (safeguards embodied in Fed. R. Civ. P. 23 "seem plainly intended to meet" the due process requirements of *Hansberry v. Lee*).

Petitioners do not and cannot deny that they received all of the foregoing procedural protections in the Delaware Action. Instead, they now present a laundry list of alleged due process violations (none of which were presented to the Delaware courts), in an effort to undo their participation in the Delaware Action. However, the doctrine of *res judicata* itself bars Petitioners from raising their due process arguments in this Court. As described above, *res judicata* bars relitigation of claims that "were *or could have been* raised in [the prior] action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (emphasis added); *see also Ezzes v. Ackerman*, 234 A.2d 444, 445-46 (Del. 1967). Petitioners were free to raise any or all of their due process arguments in the

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[14] Petitioners never argued in the Delaware or New York courts, and do not argue here, that the representative parties in the Delaware Action were in any way inadequate.

[15] As an additional safeguard, under Delaware law a comprehensive presentation of issues is required and the Chancellor not only has the duty to invite and hear any and all objections and evidence that a shareholder wishes to present, but also has the obligation to review the record and exercise the Court's own independent business judgment to determine if the settlement is intrinsically fair in light of the circumstances. *See Polk v. Good*, 507 A.2d 531, 536 (Del. 1986); *Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 100 (Del. 1979); *Rome v. Archer*, 197 A.2d 49, 53-54 (Del. 1964).

Delaware Action, but did not. *See, e.g., Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989) (addressing objector's due process claim concerning inability to opt out of a Rule 23(b)(2) class action). Accordingly, principles of *res judicata* bar Petitioners from litigating their due process claims in this Court.

* * *

Even if *res judicata* did not bar the New York courts — and this Court as well — from considering Petitioners' claimed violations of due process, Petitioners have still failed to present a federal question worthy of review by this Court. Although Petitioners' principal contention appears to be that they did not receive due process in the Delaware Action because they were not allowed to intervene in that action (*see, e.g.*, Petition at 16, 21, 24-27), that contention does not warrant the granting of certiorari for at least two reasons.[16] *First*, Petitioners have failed to preserve the contention as a basis for an attack — collateral or direct — on the Delaware Judgment because (a) they never claimed in the Delaware Action that a denial of their motion to intervene would deprive them of due process and (b) they abandoned their motion to intervene on appeal to the Delaware Supreme Court. *Second*, the Delaware courts allowed Petitioners to object to the proposed settlement of the Delaware Action and offered Petitioners, as objectors, (a) all the procedural protections normally accorded intervenors and (b) greater procedural protections than Petitioners themselves believed were necessary to present their purely legal argument to the Delaware courts. Thus, Petitioners received due process in Delaware.

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[16] Petitioners also claim that they were denied due process because they could not "opt out" of the settlement of the derivative claims in the Delaware Action. As we demonstrate below, Petitioners did not present this claim in the courts below and therefore cannot present it here. But, in any event, Delaware Chancery Court Rule 23.1—like Federal Rule 23.1—does not allow a shareholder to "opt out" of a derivative action. Thus, Petitioners' claim is without merit. *See* Point I.D.1, *infra*.

B. Petitioners Failed To Preserve Their Due Process Arguments For Review By This Court

This Court has repeatedly held that it "will not decide federal constitutional issues raised here for the first time on review of state court decisions." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n. 16 (1983). *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1963); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805 (1971); *Street v. New York*, 394 U.S. 576, 582 (1969). This rule compels the rejection of Petitioners' claims.

As Petitioners concede in their Petition, they never raised *any* of their due process arguments in the Delaware courts. (*See* Petition at 12-15) In particular, Petitioners never claimed in the Delaware Court of Chancery that a denial of their request to intervene would offend due process. On the contrary, when allowed to participate in the Delaware action as objectors, Petitioners expressly declined to exercise all of the rights offered to them in that capacity.

Further, although Petitioners purported to appeal from the Chancellor's denial of intervention, they never challenged the denial in their briefing and oral argument before the Delaware Supreme Court.[17] (*See* R. 146-89) Instead, Petitioners styled their *sole* ground for appeal to the Delaware Supreme Court as the "very narrow issue" of whether the Chancellor had correctly construed the scope of the business judgment rule under Delaware law, as it relates "to the right of directors to use corporate funds to buy out minority shareholding interests." (R. 151)

[17] Petitioners also did not challenge in Delaware—either before the Court of Chancery or on appeal to the Delaware Supreme Court—the lack of notice of the settlement negotiations, the standard of review applied to the settlement, the inability to "opt out" of the settlement of the derivative claim, or the order of the Court of Chancery staying prosecution of their New York action pending a final determination of the Delaware Action. Thus, Petitioners also waived any claim that these rulings violated due process.

Under Delaware law, Petitioners abandoned their appeal of the denial of intervention when they failed to brief or argue the point to the Delaware Supreme Court. *See Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958) (a point not briefed is a point abandoned).[18] Having abandoned their attempt to intervene in the Delaware Supreme Court, and having failed to make any due process argument of any kind in the Delaware courts, Petitioners would have been barred from challenging the denial of intervention had they applied in this Court for a writ of certiorari to the Delaware Supreme Court. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1963). *A fortiori*, Petitioners cannot revive these already-waived due process claims by bringing a collateral attack upon the Delaware Judgment in New York. *See In re Antibiotic Antitrust Actions*, 333 F. Supp. 296, 298 (S.D.N.Y.) (where class members receive notice of and actually participate in the hearing on a proposed settlement, a direct appeal of the judgment approving the settlement is the only proper way to obtain appellate review) , *aff'd sub nom. Connors v. Chas. Pfizer & Co.*, 450 F.2d 1119 (2d Cir. 1971), *cert. denied*, 408 U.S. 930 (1972) ; *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (sole proper avenue of appeal for class member who participates at a settlement hearing and is dissatisfied with a judgment approving a settlement is a direct appeal). *See also Brown v. Georgia Power Co.*, 371 F. Supp. 543, 546 (S.D. Ga. 1973) ("the failure of the plaintiff to avail himself of his opportunity to challenge the procedure complained of by direct attack operates to bar collateral considerations of the issues upon the familiar doctrine of *res judicata*."), *aff'd*, 491 F.2d 117 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974).

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[18] A state "certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (emphasis in original; citations omitted); *Thomas v. Arn*, 474 U.S. 140, 156 (1985). Petitioners do not challenge the validity of the Delaware rule requiring briefing to preserve a claim on appeal.

C. In The Delaware Action, Petitioners Received, As Objectors, All The Due Process Protections Requested By Them—And More

Even if Petitioners have not waived their right to present their due process claims to this Court, Petitioners' intervention argument should be rejected because it elevates form over substance. Petitioners now claim that, although they were allowed to appear and present their arguments in the Delaware Action as "objectors," they were denied due process because they were denied the status of "intervenors." But, Petitioners *never* explain what they could have done as "intervenors" in Delaware that they did not do as "objectors." Nor can they.

There is no practical difference between opposing the proposed settlement of a derivative action as an "intervenor" or as an "objector." As the court explained in *Webcor Electronics v. Whiting*, 101 F.R.D. 461 (D. Del. 1984), a case strikingly similar to the Delaware Action, a shareholder's "title as an 'intervenor' or 'objector' holds no importance" in this context because the shareholder has a right to present briefs and arguments and take discovery into the fairness of the settlement in either capacity. *Id.* at 463; *see also In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1087 (6th Cir.) (shareholder given full opportunity to object to settlement of derivative action has no right to intervene), *cert. denied*, 469 U.S. 858 (1984).

In fact, although denied the title of "intervenors," Petitioners received everything they asked for, and their rights were fully protected in the Delaware Action. The following facts are undisputed. Petitioners received actual notice of the proposed settlement of the Delaware Action and of the hearing to consider the fairness of the proposed settlement. (R. 45-48)[19] As objectors, Petitioners were allowed to challenge the proposed settlement of the Delaware Action.

[19] Accordingly, Petitioners' discourse on the "adequacy of notice" principles embodied in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and its progeny (Petition at 18-19) is irrelevant.

Petitioners were given the opportunity to conduct discovery and present evidence to the court. However, in open court, Petitioners specifically and unequivocally declined the opportunity for further discovery, and explained that they wanted only to challenge the proposed settlement of the derivative claim by making a purely legal argument based upon the factual record already developed. (R. 391)

The Chancellor granted Petitioners' request. Petitioners filed briefs in opposition to the settlement of the derivative claim, and Petitioners' counsel participated in oral argument before the Court of Chancery. (R. 387-92) The Court of Chancery considered Petitioners' argument and rejected it on its merits. (R. 125-28, 133)

Under the circumstances, the Chancellor's denial of the motion to intervene did not deprive Petitioners of due process. *See, e.g., Webcor Electronics*, 101 F.R.D. at 466 (shareholder denied intervenor status received due process when allowed to present all arguments in opposition to proposed settlement of derivative action as an objector); *In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d at 1087; *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 325 (10th Cir. 1984) (denying shareholder's motion to intervene in a derivative action; the shareholder "was afforded the full panoply of procedural due process when he received adequate notice of the settlement hearing and had the significant opportunity to be heard by submitting an extensive memorandum to the court prior to the hearing detailing his objection to the settlement").[20]

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[20] *See also Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 584 (6th Cir.), *cert. denied*, 459 U.S. 969 (1982); *Officers For Justice v. Civil Serv. Comm'n of San Francisco*, 473 F. Supp. 801, 829-30 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Alaniz v. California Processors, Inc.* 73 F.R.D. 289, 295 (N.D. Cal. 1976) *aff'd sub nom. Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978).

Moreover, as the Chancellor recognized (R. 133-34), intervention was unnecessary to enable Petitioners to present their purely legal argument to the Delaware Supreme Court. Petitioners appealed from the Delaware Judgment to the Delaware Supreme Court, which accepted two briefs from Petitioners (R. 146-89) and heard argument from their counsel. (*See* R. 191)[21] The Delaware Supreme Court considered Petitioners' argument under Delaware law and rejected the argument on the merits. (R. 203 ("our recent decision in *Unocal* completely rejects [Petitioners'] thesis")) Petitioners do not identify anything else that they could have done in the Delaware Supreme Court as "intervenors."

* * *

In *Jones v. Nuclear Pharmacy, Inc.*, *supra*, the Tenth Circuit held that "[a]lthough the right to be heard is an integral part of due process, an individual entitled to such process is not entitled to dictate to the court the precise manner in which he is to be heard." 741 F.2d at 325. The *Jones* court's holding is equally applicable here. Petitioners were allowed to object to the settlement of the Delaware Action, and received *everything* that they asked for, even as "objectors." Thus, Petitioners' due process claim based upon the denial of intervention is simply an improper attempt to "dictate to the court" the manner in which they wished to be heard. Petitioners' claim is without merit.

D. Petitioners' Other Claims Are Without Substance

Like their intervention claim, Petitioners' other arguments do not present properly preserved questions for this Court; nor do they present important federal questions of due process.

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[21] In the Delaware Supreme Court, Petitioners continued to concede that the "material facts of this matter are not in dispute." (R. 154)

1. *The Opt-Out Argument*

Petitioners argue that they were denied due process because they were not allowed to "opt out" of the court approved settlement of the Delaware Action (Petition at 22-25). However, Petitioners never asked to "opt out" of the Delaware Action, and have never before claimed — either in Delaware or New York — that their inability to "opt out" of the settlement of the Delaware Action was a denial of due process. Petitioners cannot raise that claim here for the first time. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1963).

Moreover, Petitioners' reliance upon *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) is misplaced, because *Shutts* was a *class action* for money damages inflicted directly on the members of a plaintiff class. Here, in contrast to *Shutts*, Petitioners asserted only *derivative* claims in their New York action, and their arguments in the Delaware Action focused exclusively on the merits of the derivative claims asserted there. (*See* R. 16-22, 72, 75, 86-87, 172) Shareholder derivative claims are fundamentally different from class claims, because shareholders have no *individual* interests to protect in a derivative action. In fact, the Delaware Chancery Court Rules and the Federal Rules of Civil Procedure recognize this fundamental difference between class actions and derivative actions, and Delaware Chancery Court Rule 23.1, like Federal Rule 23.1, does not give shareholders the right to "opt out" of the settlement of a derivative action. *See Guenther v. Pacific Telecom, Inc.*, 123 F.R.D. 341, 347 (D. Or. 1987) (noting that Federal Rule 23.1 does not allow shareholders to opt out of a derivative suit). Thus, the class action "opt out" rules discussed in *Shutts* are not applicable here.[22]

[22] Petitioners' complaint about the inability to "opt out" of the settlement of the derivative claim in Delaware could be construed as a claim that *Rule 23.1 itself* violates due process. That claim is without merit. In a derivative action, the shareholder plaintiff seeks to enforce a right

2. *The Standard Of Review Argument*

Petitioners also argue that the supposedly "highly limited" standard of review applied by the Delaware courts to the proposed settlement of the Delaware Action deprived them of due process, because Petitioners' opportunity to present objections under the "highly limited" standard of review was not "equivalent to a determination on the merits." (Petition at 20-21)

Here again, Petitioners' failed to preserve that objection for review by this Court because they failed to present any such objection to the courts below—in Delaware or New York. In any event, the standard of review employed by the Delaware courts — whether the settlement was "fair and reasonable and adequate under the circumstances" — is universally accepted in representative suits as the proper standard of review of a proposed settlement in class or derivative action. *See, e.g., Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *Girsh v. Jepson*, 521 F.2d 153, 160 (3d Cir. 1975).

Similarly, the "abuse of discretion" standard applied by the Supreme Court of Delaware (R. 199) is consistently applied in Delaware, *see Neponsit Investment Co. v. Abramson*, 405 A.2d 97, 100 (Del. 1979); *Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964), and in the federal courts. *See, e.g., Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *In re*

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belonging to *the corporation*—not to himself—and any recovery is for the benefit of *the corporation*. In this context, the shareholders have no individual interests to protect, and there is not need for a procedure that would allow a shareholder to "opt out." Where, as here, a shareholder believes that a proposed settlement of a derivative action is unfair to the corporation, the shareholder can fully protect his rights by objecting to the settlement. *See In re General Tire & Rubber Co., Sec. Litig.*, 726 F.2d at 1087; *Webcor*, 101 F.R.D. at 466 (and the cases cited therein).

Warner Communications Sec. Litig., 798 F.2d 35, 37 (2d Cir. 1986); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* § 23.80[4] at 23-486 n.5 (2d ed. 1987).[23]

Petitioners cite *Ross v. Bernhard*, 396 U.S. 531 (1970) (Petition at 21-22), for the proposition that the constitution entitled them to a trial on the merits of their derivative claim. That assertion is frivolous. *Ross* deals only with the question whether a shareholder plaintiff is entitled to try a derivative claim before a jury, rather than before the court. Nothing in *Ross* suggests that derivative claims cannot be settled before trial, or that an objector to such a settlement has the right to try his claim where, as here, the court concludes that the settlement is fair, reasonable and adequate.

Moreover, Petitioners cannot dispute that they did receive a full hearing on their legal argument concerning Delaware corporate law. Petitioners admitted in the Delaware Action that the facts were undisputed (R. 72, 154, 391), and the Court of Chancery and the Delaware Supreme Court considered and rejected Petitioners' legal argument *on the merits*. Thus, Petitioners *did* receive a "determination on the merits" of the one claim they wished to pursue.

II. THE DISMISSAL OF PETITIONERS' NEW YORK DERIVATIVE ACTION WAS NOT INCONSISTENT WITH *MARTIN V. WILKS*

In an attempt to manufacture a conflict with a prior decision of this Court, Petitioners seek to portray the dismissal of their New York action as inconsistent with this Court's recent decision in *Martin v. Wilks*, __ U.S. __, 109 S. Ct. 2180 (1989) (Petition at 27-35). *Martin*, however, is inapposite. Nor

[23] The "fair, reasonable and adequate" and "abuse of discretion" standards serve the salutary purpose of allowing a court to assess the merits of a proposed settlement without conducting a full-blown trial on the merits, which would defeat the purpose of the settlement. *See, e.g., City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974).

does it make a "dramatic departure" from the principles of *res judicata* applicable to persons, like Petitioners, who were afforded ample opportunity to challenge a proposed settlement of a derivative claim. *Martin* holds only that, absent resort to class or other representative procedures, "a party seeking a judgment binding on another cannot obligate that person to intervene but must join such person as a party" in accordance with the Federal Rules of Civil Procedure. 109 S. Ct. at 2185.[24]

In *Martin*, this Court allowed certain white firefighters in Birmingham, Alabama — who were not parties to a prior action that resulted in an affirmative action consent decree between the plaintiffs, black firefighters, and the defendant city — to attack the decree when the city invoked it as a basis for employment decisions affecting the white firefighters. The city argued that the white firefighters should be bound by the decree because they had failed timely to intervene in the black firefighters' action against the city, notwithstanding their receipt of notice of the proposed consent decree. This Court held that the Federal Rules of Civil Procedure place the burden on the party seeking to bind others to a judgment to join such persons as parties to the action. 109 S. Ct. at 2185. Consequently, the white firefighters' failure to intervene did not except the case from the governing "principle of general application in Anglo-American jurisprudence" —

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[24] Petitioners' reliance on *Society Hill Civic Assocation v. Harris*, 632 F.2d 1045 (3d Cir. 1980) (Petition at 25) is likewise misplaced. *Society Hill* held that the plaintiffs could not, consistent with due process, be barred from collaterally attacking a consent decree in a prior action because (a) the prior action was not certified as a class action, (b) the plaintiffs were not parties to that prior action, and (c) the plaintiffs had not been allowed to challenge the consent decree in the prior action. *See* 632 F.2d at 1050-53 and n. 4. Here, of course, Petitioners were represented and actually participated as objectors in the proceedings that led to the settlement and judgment in the Delaware Action.

> [T]hat one is not bound by a judgment in *personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . .

109 S. Ct. at 2184 (quoting *Hansberry*, 311 U.S. at 40; citations omitted; footnote omitted).

However, in *Martin*, this Court expressly "recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." 109 S. Ct. at 2184 n.2 (citations omitted). In the Delaware Action, Petitioners' interests were adequately represented "by someone with the same interests who [was] a party." Petitioners have never complained about the adequacy of the representative parties in the Delaware Action. Moreover, as described above, Petitioners received notice of and an ample opportunity to object to the settlement of the Delaware Action, and the Delaware courts carefully considered Petitioners' arguments. Thus, the exception noted in *Martin* for representative actions is fully applicable here and is dispositive.

Indeed, the fundamental distinction between representative and non-representative actions renders *Martin* vastly different from this case. Class actions are specifically designed to enable a plaintiff to bind others to a judgment without the necessity of joinder because, *inter alia*, "the class is so numerous that joinder of all members is impracticable." Del. Chancery Court Rule 23(a); *see* Fed. R. Civ. P. 23(a). Likewise, a derivative action enables one or more shareholders to "enforce a right of a corporation" without joining each and every shareholder in the action. Del. Chancery Court Rule 23.1; *see* Fed. R. Civ. P. 23.1. As this Court recognized in *Martin*, to apply *Martin*'s joinder requirement in these "representative" actions would defeat the purposes behind class and derivative actions. *See* 109 S. Ct. at 2184 n. 2.

Moreover, Petitioners' claim that *Martin* justifies the granting of certiorari merely because the Delaware courts denied Petitioners the opportunity to intervene elevates form over substance. The white firefighters in *Martin* had not been members of the class in the action brought by the black firefighters which gave rise to the consent decree. Thus, the denial of the white firefighters' motion to intervene in that action deprived them of a hearing and a disposition of their objections to the consent decree.[25] Here, in stark contrast to *Martin*, the denial of intervention in the Delaware Action was irrelevant, because Petitioners, as Texaco shareholders, were allowed to object to the settlement of the derivative claims, received all of the procedural protections they wished (even without the label "intervenor") and were offered, but declined, wider participation.[26]

Unlike the white firefighters in *Martin*, Petitioners received from the Delaware courts an adjudication *on the merits* of their objections to the settlement. Nothing in *Martin* allows Petitioners the opportunity to relitigate their derivative claims in New York. The New York courts correctly granted full faith and credit to the Delaware Judgment.

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[25] As this Court noted, the Birmingham Firefighters Association (of which the white firefighters were members) appeared in the first action only in the role of "amicus curiae"—a limited degree of participation which, as the Eleventh Circuit noted, "hardly made the BFA a party to the consent decrees." *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1499 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, __U.S. __, 109 S. Ct. 2180 (1989).

[26] Even if the white firefighters in *Martin* had been granted the same broad substantive and procedural rights offered Petitioners in the Delaware Action (as Petitioners seem to imply, Petition at 33-34), *Martin* would still be distinguishable on at least two independent grounds. First, by failing in Delaware to challenge the procedures as inadequate, Petitioners waived the contentions they now raise in their Petition. Second, the only issue raised by Petitioners in Delaware was a purely legal challenge to the settlement under Delaware law, which the Delaware courts considered and rejected on its merits.

CONCLUSION

For the foregoing reasons, Respondents urge the Court to deny the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

Dated: New York, New York
January 16, 1990

Respectfully submitted,

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